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No. 2921

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**UNITED STATES**  
**CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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LOUIE DING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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**TRANSCRIPT OF RECORD**

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN  
DIVISION.

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Press of Pliny L. Allen Co., Seattle

**Filed**

JAN 12 1917

**F. D. Monckton,**  
Clerk.





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*In the District Court of the United States for the  
Western District of Washington. Northern  
Division.*

No. 3299

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN B. MILLER, WILLIAM KIRKLAND,  
LOUIS E. LORTIE, HARRY TOY and  
LOUIE DING,

Defendants.

**NAMES AND ADDRESSES OF COUNSEL.**

WILLIAM R. BELL, Esq., Attorney for Defend-  
ant and Plaintiff in Error,

1024 L. C. Smith Building, Seattle, Wash.

WALTER S. FULTON, Esq., Attorney for Defend-  
ant and Plaintiff in Error,

1112 Hoge Building, Seattle, Wash.

CLAY ALLEN, Esq., Attorney for Plaintiff and  
Defendant in Error,

Room 310 Federal Building, Seattle, Wash.

WINTER S. MARTIN, Esq., Attorney for Plain-  
tiff and Defendant in Error,

Room 310 Federal Building, Seattle, Wash.





*In the District Court of the United States for the  
Western District of Washington. Northern  
Division.*

No. 3299

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN B. MILLER, WILLIAM KIRKLAND,  
LOUIS E. LORTIE, HARRY TOY and  
LOUIE DING,

Defendants.

**INDICTMENT.**

*The United States of America, Western District  
of Washington, Northern Division, ss.*

The grand jurors of the United States of America, duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

That Melvin B. Miller, William Kirkland, Louis E. Lortie, Harry Toy and Louie Ding, on the first day of October, A. D. One Thousand Nine Hundred and Fifteen, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this Court, did wilfully, knowingly, unlawfully, feloniously, wickedly and ma-

liciously conspire, combine, confederate and agree together, and together and with divers other persons to these grand jurors unknown, to commit certain offenses against the United States, all as a part of said conspiracy mentioned, to-wit, to violate Section 11 of the Act of Congress of May 6, 1882, as amended and added to by the Act of July 5, 1884, in this: That it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly, unlawfully, feloniously and maliciously bring into and cause to be brought into the division and district aforesaid, and aid and abet the landing of, by vessel, at Seattle in said division and district aforesaid, in the United States, from Vancouver, in the province of British Columbia in the Dominion of Canada, seven certain alien Chinese persons not lawfully entitled to be or remain in the United States, the names of said seven alien Chinese persons being to these grand jurors unknown; and to violate Section 8 of the Act of Congress of February 20, 1907, as amended, in this:

That it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly, unlawfully, feloniously and maliciously bring into and land in the United States, at Seattle, aforesaid, by vessel, certain alien persons, who had not theretofore been duly admitted by an immigrant inspector of the



United States, and who were not lawfully entitled to enter the United States or be or remain in the United States at all; the names and a more particular description of said alien Chinese persons being to these grand jurors unknown.

And the grand jurors aforesaid, upon their oaths do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Melvin B. Miller, Louis E. Lortie and William Kirkland on the eighth day of October, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, unlawfully and feloniously go from Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this Court, to Vancouver, in the province of British Columbia in the Dominion of Canada, on board a certain gasoline boat known as the "Maud K."

And the grand jurors aforesaid, upon their oaths do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Melvin B. Miller and William Kirkland did wilfully, knowingly, unlawfully and feloniously receive on board a certain gasoline boat known as "Maud K" seven certain alien Chinese persons, whose names are to these grand jurors unknown, and who were not lawfully entitled to enter

the United States, and then and there navigated, operated and sailed the said boat, "Maud K", from Vancouver, in the province of British Columbia in the Dominion of Canada, to Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this Court, which said persons on board said boat arrived in said Seattle on the Tenth day of October, A. D. One thousand nine hundred and fifteen.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## **COUNT II.**

And the grand jurors aforesaid upon their oaths do further present:

That Melvin Miller, William Kirkland, Louis E. Lortie, Harry Toy and Louie Ding on the Tenth day of October, A. D. One thousand nine hundred and fifteen, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this Court, did then and there wilfully, knowingly, unlawfully and feloniously bring into, and cause to be brought into, the Division and District aforesaid seven certain Chinese alien persons, from the province of British Columbia in the Dominion of Canada, by vessel, and then and there did aid and abet the landing of said

alien Chinese persons from a vessel, to-wit, a gasoline boat then and there named the "Maud K," the names of and a more particular description of said alien Chinese persons being to these grand jurors unknown; which said alien Chinese persons were then and there not lawfully entitled to enter the United States, nor were they entitled to enter the United States at all, nor were they entitled to be or remain in the United States.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Asst. United States Attorney.

Indorsed: Indictment for violation Sec. 37 Penal Code to violate Sec. 11, Act May 6, 1882, as amended, and Act Feb. 20, 1907, Sec. 8. A True Bill. John D. Wenger, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court March 29, 1916. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.



**ARRAIGNMENT AND PLEA.**

Now on this day into open Court comes the said Defendant Louie Ding for arraignment, accompanied by his counsel Thos. B. MacMahon, and being asked if the name by which he is indicted is his true name, replies "My true name is Louie Tong Ding." Whereupon the reading of the indictment is waived and he here and now enters his plea of not guilty to the charge in the indictment herein against him.

Dated March 30, 1916.

Journal 5, Page 294.

**TRIAL.**

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by W. S. Martin, and the defendant Harry Toy represented by C. F. Riddell, and Louie Ding by T. B. MacMahon and W. R. Bell, the cause is resumed as to trial of defendants Harry Toy and Louie Ding, both being present. The Court proceeds with the selection of jury and the following persons are called: T. H. Ryan, A. A. Swain, John P. Leander, A. B. Robinson, Loren F. White, Sutcliffe Baxter, C. F. Poeppel, John Ash, O. J. Post, Joe Ulrich, F. J. Walsh and J. V. Dyer, twelve good and lawful men duly empaneled and sworn. The defendants move that the Government be required to elect which

count, etc., the cause shall be tried upon, which motion is denied by the Court. On motion of defendants, it is ordered that witnesses for both sides be excluded from the Court Room except while testifying. Opening statement of U. S. Attorney is made to the jury. Defendant Ding moves for severance which is denied. Defendant Ding also moves for dismissal which is denied. Harry Toy moves for dismissal which is denied and motion for severance which is denied. The following witnesses are examined on behalf of the United States: Louis Lortie, Melvin B. Miller, H. F. McGrath, R. Bonham, Thos. M. Fisher and T. W. Smith. And now the hour of adjournment having arrived, by consent of parties it is ordered by the Court that this cause be and is hereby continued until ten o'clock tomorrow morning, and the Court having cautioned the jury in this case they are allowed to separate until that hour.

Dated June 7, 1916.

Journal 5, Page 369.

#### **VERDICT FOR LOUIE DING.**

We, the jury in the above entitled cause, find the Defendant Louie Ding is guilty of Count I, and recommend extreme leniency of the Court. Thos. H. Ryan, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern

Division, June 8, 1916. Frank L. Crosby, Clerk.  
By E. M. L., Deputy.

**MOTION FOR NEW TRIAL.**

Comes now defendant Ding and moves the court to set aside the verdict of the jury herein returned on the 8th day of June, 1916, and grant a new trial for the reason and upon the following grounds:

1. That said verdict was against and contrary to law.

2. That said verdict was against and contrary to the evidence.

3. Insufficiency of the evidence to justify the verdict.

4. Errors of law occurring during the trial and excepted to at the time by the said defendant.

5. Erroneous instructions given to the jury by the trial judge.

6. Variance between the indictment and the proof introduced at the time of the trial.

7. Misjoinder of the parties defendant.

8. Misjoinder of separate and independent offenses.

9. Misconduct of the jury.

10. Separation of the jury after submission of the case to them and before verdict.

WILLIAM R. BELL,  
Defendants' Attorney.



Received copy of the foregoing and service thereof admitted this 12th day of June, 1916.

Attorney for Plaintiff.

Indorsed: Motion for new trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 12, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

**MOTION IN ARREST OF JUDGMENT.**

Comes now defendant Ding and moves the court to arrest the judgment herein for the reason and upon the following grounds:

1. That the evidence introduced was insufficient to sustain the verdict rendered herein.

2. Variance between the indictment and the proof introduced at the time of trial.

3. Misjoinder of the parties defendant.

4. Misjoinder of separate and independent offenses.

5. Misconduct of the jury.

6. Separation of the jury after submission of the case to them and before verdict.

WILLIAM R. BELL,

Defendant's Attorney.

Received copy of the foregoing and service thereof admitted this 12th day of June, 1916.

Attorney for Plaintiff.

Indorsed: Motion in Arrest of Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 12, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

#### **HEARING ON MOTION FOR NEW TRIAL.**

Now at this time, the Defendant Louie Ding being in open Court, accompanied by his counsel, motions are made for new trial and in arrest of judgment, and the Court after hearing argument of respective counsel denies said motions. The defendant is sentenced and he gives notice of appeal. Supersedeas bond is given in the sum of \$8,000 in cause No. 3282, to cover in this case.

Dated June 12, 1916.

Journal 5, Page 374.

#### **BOND**

KNOW ALL MEN BY THESE PRESENTS, That we, Louie Ding, as Principal, and Casualty Company of America, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business of Surety in the State of Washington, as Surety, are held and firmly bound unto the United States of America, Plaintiff in the above entitled action, in the penal sum of Five thousand dollars (\$5,000.00), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, exe-

cutors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above named defendant, Louie Ding, was on the 12th day of June, 1916, sentenced in the above entitled case No. 3282 to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington and in addition thereto to pay a fine of Five hundred dollars (\$500.00) and in the above entitled case No. 3299 was on the same date sentenced to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington, to run concurrently with the sentence in the first mentioned case and in addition to pay a fine of Five hundred dollars (\$500.00) and;

WHEREAS, The said Defendant has appealed from the sentence and judgment in each of said cases to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

WHEREAS, The above entitled court has fixed the defendant's bond, to stay execution of the judgment in both of the said cases, in the sum of Eight thousand dollars (\$8,000.00), of which there is now three thousand dollars (\$3,000.00) in cash on deposit with the registrar of the court;

NOW THEREFORE, If the said defendant, Louie Ding, shall diligently prosecute his said appeals and shall obey and abide by and render him-



self amenable to all orders which said appellate court shall make, or order to be made, in the premises and shall render himself amenable and obey all process issued, or ordered to be issued, by said appellate court herein and shall perform any judgment made or entered herein by said appellate court, including the payment of any judgment on appeal and shall not leave the jurisdiction of this Court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable and obey any and all orders issued herein by said District Court and shall pursuant to any order issued by said District Court surrender himself and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise, to remain in full force and effect.

Sealed with our seals and dated this 12th day of June, A. D. 1916.

LOUIE DING,

By W. R. Bell, his Attorney in  
Fact.

CASUALTY CO. OF AMERICA,

By C. Summer Best, Resident  
Manager and Attorney in fact.

(SEAL)

The foregoing bond is hereby approved this 12th day of June, 1916, and the Marshal of this Court is hereby ordered to release the defendant, Louie Ding, from custody, pending the termination of his appeal and the fulfillment of the conditions of the foregoing bond.

JEREMIAH NETERER, Judge.  
WINTER S. MARTIN,  
Asst. U. S. Attorney.

Approved this 13th day of June, 1916.  
United States District Judge.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 13, 1916. Frank L. Crosby, Clerk. By Deputy.

**BOND**

KNOW ALL MEN BY THESE PRESENTS That we, Louie Ding, as principal, and Casualty Company of America, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business of Surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, Plaintiff in the above entitled actions, in the penal sum of Three thousand dollars (\$3,000), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the above named defendant, Louie Ding, was on the 12th day of June, 1916, sentenced in the above entitled case No. 3282 to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington and in addition thereto to pay a fine of five hundred dollars (\$500.00) and in the above entitled case No. 3299 was on the same date sentenced to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington, to run concurrently with the sentence in the first mentioned case and in addition to pay a fine of Five hundred dollars (\$500.00); and

WHEREAS The said defendant has appealed from the sentence and judgment in each of said cases to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

WHEREAS The above entitled Court has fixed the defendant's bond, to stay execution of the judgment in both of the said cases, in the sum of Eight thousand dollars (\$8,000.00), of which there is now on file in said Court a bond in the sum of Five thousand dollars (\$5,000.00), bearing date the 12th day of June, A. D. 1916, with the aforesaid Casualty Company of America as surety thereon;

NOW THEREFORE If the said defendant, Louie Ding, shall diligently prosecute his said appeals and shall obey and abide by and render himself amenable to all orders which said appellate



court shall make, or order to be made, in the premises and shall render himself amenable and obey all process issued, or ordered to be issued, by said appellate court herein and shall perform any judgment made or entered herein by said appellate court, including the payment of any judgment on appeal and shall not leave the jurisdiction of this court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable and obey any and all orders issued herein by said District Court and shall pursuant to any order issued by said District Court surrender himself and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 19th day of June, A. D. 1916.

LOUIE DING,  
CASUALTY CO. OF AMERICA,  
By C. Summer Best, Resident  
Manager and Attorney in fact.

(SEAL)

The foregoing bond is hereby approved this 19th day of June, 1916.

JEREMIAH NETERER,  
United States District Judge.

Within bond approved this 23d day of June, 1916.

WINTER S. MARTIN,  
Asst. U. S. Attorney.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist, of Washington, Northern Division, June 23, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

**OPINION OF COURT  
ON OBJECTION TO COMPETENCY OF WITNESS—OB-  
JECTION SUSTAINED.**

CLAY ALLEN,  
U. S. Attorney for Government,  
WINTER S. MARTIN,  
Asst. U. S. Attorney, for Government,  
CHARLES F. RIDDELL,  
W. R. BELL,  
For Defendant.

NETERER, District Judge:

The Government having offered Mr. Kirkland as a witness, and the defendant objecting to the witness being sworn and permitted to testify, on the ground that he does not believe in the existence of a God who is the rewarder of truth and the avenger of falsehood, the witness was interrogated as to his belief, and he stated, "I believe there is a Creator, a cause for all that we see and all that we hear." He does not believe that there is a God who re-

wards truth and avenges falsehood, and says, "I think a man gets all his punishment in this world while he is here." And in reply to a question by counsel for defendant—"As a matter of fact your belief is that the punishment you receive in this world comes from yourself and from the men in the world. A. Yes. Q. And not from God? A. No, I don't think it comes from God."

In reply to an inquiry as to whether the taking of an oath meant anything to the witness he shook his head and said it did not mean a great deal to him, and "I think I could tell the truth if I never took an oath."

Under the common law rule a person who does not believe in a God who is the rewarder of truth and the avenger of falsehood cannot be permitted to testify; *Thurston v. Whitney et al.*, 2 Cushing (Mass.) 104; Jones on Evidence, Blue Book, Vol. 4, Sec. 712-13.

District Judge Wilkin, 1 Fed. Cases, 446, held that the testimony of an atheist is not admissible.

In *U. S. v. Lee*, Fed. Cases 15,586, Circuit Court of the District of Columbia, it was held that a man who does not believe in the existence of a God other than nature or in a future state of existence is not a competent witness.

In *Wakefield v. Ross*, 28 Fed. Cases, 17,050, District of Rhode Island, it was held that a person who does not believe in the existence of a God or in a

future state of existence is not a competent witness, and cited *Scott v. Hooper*, 14 Vermont, 530, and *Thurston v. Whitney, supra*. The rigidity of this rule has been somewhat relaxed, and a person has been permitted to testify who believed in the existence of a God who was the rewarder of truth and the avenger of falsehood, either in this or a future life. This rule did not necessarily imply that a person had to subscribe to his belief in the Christian religion. If a person believes in the existence of a God who rewards truth and avenges falsehood, either in this or a future life, it is immaterial whether that belief is in accordance with the Christian belief or not. Any religious belief, whatever it may be, which recognizes the usual form of oath administered as invoking Deity to witness its truthfulness, and recognizes that falsehood will be punished, is sufficient.

I know of no cases that will permit a person to qualify as a witness who does not subscribe to some religious belief recognizing a Supreme Being, and who is not moved or impressed by some conscientious scruple with relation to the testimony in its truthfulness or falsity to be rewarded or avenged in this life or some future life. *State v. Wash.*, 42 L. R. A. (O. S.) 553, and cases cited. And if our form of oath is not binding upon persons of other religious beliefs, the form which is recognized as binding can be administered. A Jew may be sworn



on the Pentateuch or Old Testament, with his head covered, a Mohammedan on the Koran, a Gentoo touching with his hand the foot of a Brahmin or priest of his religion, a Chinese by breaking a china saucer. Wharton Criminal Evidence, Vol. 1 Sec. 354.

Section 1, Article II of the Constitution of the State of Washington, provides that "No religious qualification shall be required for any public officer; nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion; nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony." Section 858 of the Revised Statutes of the United States provides that "The laws of the State in which the court is held shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." The common law consists of those principles, maxims, usages and rules founded on reason, natural justice and an enlightened public policy, deduced from universal and immemorial usage, and receiving progressively the sanction of the courts. Common law is generally used in contra distinction to statute law, *Levy v. McCartee*, 31 U. S., 6 Peters, 102. There are no common law crimes in the United States as a unit, as recently held by the Supreme Court of the United States, and *In re Green*, 52 Fed. 104. In the

various states the common law as recognized is by no means universal, *Patterson v. Winn*, 30 U. S., 5 Peters, 233. The term "common law" is used in our statute to distinguish it from criminal actions. It was held in *Kirby v. C. & N. W. R. Co.*, 106 Fed. 551, that within the meaning of the Act of March 31, 1887, Chapter 373, Sec. 1, 24 St. 552, Section 1, providing that courts of the United States shall have original cognizance of all suits of a civil nature at common law or in equity, the expression "common law" is used to distinguish it from a criminal action. The Supreme Court, in *Logan v. U. S.*, 144 U. S., at page 300, clearly limits the application of the expression "at common law" used in Section 858 *supra*, when it says:

"By the Judiciary Act of September 24, 1789, c. 20, Sec. 34, it was enacted 'that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' 1 Stat. 92. Although that section stood between two sections clearly applicable to criminal cases, it was adjudged by this court at December term, 1851, upon a certificate of division of opinion of the Circuit Court, directly presenting the question, that the section did not include criminal trials, or leave to the States the power to prescribe and change from time to time the rules of evidence in trials in the courts of the United States for offences against the United States."

This case has not been overruled or modified.

The Circuit Court of Appeals for this Circuit, in *Cohen v. U. S.*, 214 Fed., at page 28, says:

“The competency of witnesses in criminal trials in the Courts of the United States is not governed by the statute of the State, but by the common law, except where Congress has made specific provisions on the subject.”

My attention has been called to the expression of the Supreme Court in *Crawford v. U. S.*, 212 U. S. 183, but this case, when taken with what is said by the Supreme Court in *Logan v. U. S.*, *supra*, cannot have any weight upon this issue.

I see no other course than to sustain the objection.

Bill of Exceptions, Pages 264-268.

Indorsed: Opinion on Objection to Competency of Witness. Filed in the U. S. District Court, West. Dist. of Washington, Northern Division, June 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

**ORDER EXTENDING TIME TO JULY 22ND, 1916, FOR  
SIGNING. ALLOWANCE AND FILING OF  
BILL OF EXCEPTIONS.**

Now on application of the defendants for an order extending the time for the signing, allowance and filing of the bill of exceptions herein, and cause being shown therefor, such application is granted and the time for the signing, allowance and filing of the bill of exceptions of the defendant is

extended up to and including the 15th day of July, 1916.

Done in open court this 30th day of June, 1916

JEREMIAH NETERER, Judge.

Indorsed: Order Extending Time for Signing, Allowance and Filing Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 30, 1916. Frank L. Crosby, Clerk.

#### **BILL OF EXCEPTIONS.**

BE IT REMEMBERED that this cause came on regularly to be heard on this the 3rd day of June 1916, before the Hon. Jeremiah Neterer, one of the judges of the above entitled court, sitting with a jury duly empaneled and sworn, the plaintiff being represented by Clay Allen and Winter S. Martin, Esq., United States District Attorney and Assistant United States District Attorney, respectively; and the defendant Harry Toy, being represented by Messrs. Jones & Riddell, Hugh Todd and Paul Carrigan, Esq.; and the defendant Louie Ding, being represented by Thomas B. MacMahon and William R. Bell, Esq.; whereupon a trial was had and testimony offered and taken and proceedings had and done, of which the following are excerpts. That it has been stipulated that the following portions of said proceedings and testimony are the only portions thereof that defendant Louie Ding shall be required to incorporate in the printed record



on his appeal herein:

In his opening statement to the jury, the United States District Attorney made the following statement:

“Now, gentlemen of the jury, upon those two counts of the indictment, the Government expects to show you, and prove to you by witnesses on the witness stand, that these three white men, Lortie, Miller and Kirkland, operated at the suggestion of the two Chinese defendants for the purpose of bringing in the seven Chinese aliens who were subsequently brought in.

Kirkland was the owner of the boat, ‘Maud K’, and kept his boat out here at Ballard. The ‘Maud K’ is a launch twenty-five or thirty feet long, able to go safely and comfortably to Vancouver, and to bring back the Chinese aliens. That Kirkland had a long acquaintance with Miller, and had a considerable acquaintance with the defendant Lortie and that Lortie had an acquaintance with Louie Ding, and Kirkland had an acquaintance of some standing with Harry Toy, the defendant, these two Chinese. That Lortie suggested some time shortly before the conspiracy, to Kirkland that he was going after some boys, as they term them, and the proof will show that they generally referred to these Chinese as “boys,” and Lortie made the suggestion that he had some boys, that he had

some avenues of influence, and that he could get some boys to bring in, and the proof will show the price for the entry, for the bringing in of these boys, or aliens, was one hundred, or one hundred and twenty-five dollars a head, and that the white men provided for the bringing in of these Chinese at that rate per head.

That Lortie told the co-defendant, Kirkland, that he had such an arrangement and would like to make a trip, and Kirkland acquiesced in it, and agreed that it was a good venture to go into, and that they planned together.

Kirkland then introduced the subject to Miller, and Miller had very little acquaintance with these Chinese, and very little acquaintance with that business, but Miller joined in the business on that suggestion, and went on Kirkland's boat.

The next meeting was held at Ballard between Kirkland and Lortie and a day or two later they all met at the dock at Ballard and Miller was present. They made their arrangements to go away on the trip; filled their tanks with oil, and prepared to leave Seattle for Vancouver. The plan was for the Chinese to give certain letters or credentials to the white men, and the white men to take those Chinese credentials to Vancouver, and deliver them to the Chinese addressee of the letter, or to the per-

son to whom the letter was directed. They were to make that call in Vancouver and deliver these letters for the purpose of identifying the white men. Upon the receipt of the letters by the Chinese in Vancouver, who were assisting the Chinese in Seattle, it was their business to deliver the Chinese to the white men, who in turn would bring them back on their boat, and help them into the United States. So that, in this case, following that plan, the letters were given by the Chinese to the defendants. The conspiracy in this case was formed first by the three white men going together, into which conspiracy came Ding and Toy. There is no connection between Ding and Toy. They were operating for their own purpose. Ding entered it for his own purpose, and Toy entered it for his. Ding and Toy came into the conspiracy then. The defendant Ding gave Lortie certain letters in Chinese for the purpose of having Lortie deliver the same letter to another Chinese in the city of Vancouver. The defendant, Harry Toy, did likewise, not in the same presence, and not at the same time, but operating in the same common purpose. He gave a letter for the two Chinese, a letter to his confederate and friend in Vancouver. The white men had two letters. Lortie had the letter from Ding, and Kirkland had the letter from Toy, and with these letters in their pockets they sailed from

Seattle, or rather, I should say, they went temporarily to Anacortes, and Lortie joined them at Anacortes; Miller and Kirkland took the boat to Anacortes, and Lortie got on the boat that night at Anacortes, and they all went to Vancouver on the gasoline boat, the 'Maud K.' Arriving in Vancouver they docked the boat, or anchored it near the shore on the outskirts at the gravel pit, near the golf links, on English Bay. I believe there is a car line goes out there from the city. They went into the city. Lortie going to the Chinese he was going to, and Kirkland went to the Chinese at 1902 Pender Street, and that Kirkland, in order to perfect the object of this conspiracy, went to the Chinese on Pender Street, and secured, or made arrangements for the delivery of two Chinese boys, or men, of the excluded class, that is, two Chinese laborers, to enter upon his boat and come down here. And Lortie took his letter up to another place in town and delivered it to one Louie, a Chinese whom he knew, and whom he had had some dealings with before, and pursuant to the delivery of that letter, which I believe contemplated the delivery of eight Chinese boys, only five were delivered. Five Chinese came down in one party, and two came down in the other. Having placed them on board the boat, Lortie left the party and returned by other means of convey-



ance to the city of Seattle, coming, I believe, on one of the Canadian Pacific Railroad boats. Miller and Kirkland with the Chinese on board, navigated across from Vancouver to the city of Seattle. They landed here at the foot of Harrison Street in the city of Seattle and Lortie was here in the city waiting to receive them. Lortie received a telephone call from the defendant Kirkland, after he had disposed of the two Chinese to the defendant Toy; and that we will show was done under the following circumstances. \* \* \* After Toy had received the two Chinese and walked off with them, Kirkland went away and went upon First Avenue, and then telephoned his friend Lortie, to send his man down for the five Chinese who still remained, and Lortie then came to the boat and received the five Chinese and piloted them through the city.”

Here counsel for plaintiff closed his opening statement and then:

MR. BELL: (attorney for defendant Louie Ding):

“In view of the opening statement of counsel for the Government, we demand on behalf of the defendant Ding a severance of the trial. That statement shows that there were, if any, two independent conspiracies, one entered into by the defendant Ding and the white defendants, Lortie and Kirkland, and the other, a

separate and distinct transaction entered into between the defendant Toy and the same white defendants. And there is not any reason that I can conceive of why these two independent conspiracies should be tried before the same jury, and why the defendant I represent should be bound or be affected by testimony against the other defendant with whom we are not charged with having any connection and with whose conspiracy we have no connection. As I take it, conspiracy means a common purpose, a confederation for the purpose of consummating some common purpose or some common end, and the opening statement made to the jury discloses that there was no such conspiracy. The statement shows that there was an alleged conspiracy between Ding and two of the white men as to some things, and another conspiracy between Toy and the other defendants as to other matters, and no connection whatever between these two defendants, Toy and Ding.

THE COURT: The motion is denied. Proceed.

MR. BELL: We will ask for an exception.

Mr. RIDDELL: (Attorney for defendant Harry Toy). Your Honor, I think the motion counsel just made is a more serious one than counsel has shown to the court.

THE COURT: I understand the seriousness of it.

MR. RIDDELL: I know, Your Honor, but I think it is sufficiently serious that we are entitled at this time to a dismissal of this action. The indictment is supposed to allege only one crime and if it alleges more than one crime it is duplicitous and the demurrer to the indictment should have been sustained. If the indictment alleges one crime, the proof cannot be on two, and either of the defendants found guilty and that makes no difference whether it is on the conspiracy count or whether it is on the other count of the indictment. In the statement of counsel he said in so many words that Ding had no connection with Toy and that Toy had no connection with Ding, and if we assume that that is true Your Honor could not instruct this jury that they might find all the white defendants guilty and the other defendants not, because counsel in his opening statement tells the jury these men had no connection with each other, so far as the conspiracy count was concerned. So far as the other count is concerned you cannot charge the defendants with bringing in seven Chinese, one bring two, and the other five. While five and two make seven in arithmetic, they do not in an indictment, and you cannot add two crimes together to make one total, and we are entitled to a dismissal. I am going to ask the court to dismiss the case as to the defendant Toy.

THE COURT: The motion is denied.

MR. RIDDELL: Then I renew my motion for a severance at this time.

THE COURT: The motion is denied.

MR. RIDDELL: We will ask for an exception to both.

THE COURT: Very well, proceed.

MR. BELL: In order to complete the record. I now move that the present action be dismissed as to the defendant Ding, and the defendant discharged from custody. This is based on the indictment and on the opening statement of counsel for the Government.

THE COURT: The motion is denied.

MR. BELL: We will ask for an exception."

Bill of Exceptions, pages 153-158.

The defendant Lortie, called as a witness by the Government, testified, *inter alia*, as follows:

"Q. (By Mr. Bell, attorney for Louie Ding.) Now, did you ever talk to Mr. Kirkland about Louie Ding in connection with this smuggling proposition?

A. No sir.

Q. Did Louie Ding know about Kirkland from you?

A. Yes sir, I believe he did. I think we talked about Kirkland.

Q. You think you talked about Kirkland?



A. It seems to me we did.

Q. What was the reason you talked to Louie Ding about Kirkland in connection with this smuggling expedition? Explain that to the jury.

A. Louie Ding explained to me that Kirkland had brought two Chinamen in. He didn't call him by name. He may have, too, but I know he mentioned the one armed Chinaman.

Q. What was the reason you talked with Louie Ding about Kirkland in connection with this smuggling expedition? Explain that to the jury.

A. Louie Ding told me that Kirkland would cause me trouble.

Q. Did you and Louie Ding have anything to do with Kirkland's deal with this other one armed Chinaman that you spoke of?

A. No sir.

Q. That was entirely independent then, with your deal with Louie Ding?

A. Yes, he knew nothing about that as far as I was concerned.

Q. Did you tell Louie Ding about these other Chinamen being brought over by Kirkland for Harry Toy?

A. I told Louie Ding that Kirkland had brought two Chinamen.

Q. Did you tell him that before or after?

MR. RIDDELL: This whole transaction is one with which we are not concerned, and I want it

understood that my objection goes to all of this.

THE COURT: I understand that. Proceed.

Q. (Mr. Bell): That was after you returned, and you told him that Kirkland brought a batch of Chinamen for some one else.

A. Yes sir.

Q. You didn't tell him that before you went to Vancouver?

A. No sir.

Q. He knew nothing whatever about that?

A. No sir."

Bill of exceptions 183-85.

The defendant Miller was on the stand as a witness for the government and testified as follows:

"Q. (By Mr. Bell, attorney for Louie Ding): Mr. Miller who was it that first spoke to you, or suggested to you first that you join in on this smuggling expedition? Was it Mr. Lortie?

A. No sir, Mr. Kirkland.

Q. Then it was with Kirkland that you went in on this deal?

A. Yes sir.

Q. And not with Lortie?

A. No sir.

Q. And you hadn't had any talk with Louie Ding about going into this particular expedition, had you?

A. No, I was going after two sets of Chinamen.

Q. You learned that from Lortie?

A. Yes.

Q. And you learned that on the boat?

A. Yes.

Q. And your arrangements were made with Kirkland?

A. Yes, on Mr. Toy's case.

Q. And not with Lortie on the Ding case. That was Lortie's venture wasn't it?

A. Yes.

Q. And you had nothing to do, and Kirkland had nothing to do with that, had you?

A. Well, we was all together.

Q. You were all together in the same boat, I understand that, but you and Kirkland were in the deal to smuggle Chinamen for Harry Toy, weren't you?

A. Yes sir.

Q. And Lortie was in the deal to smuggle Chinamen for Louie Ding.

A. Yes sir."

Bill of exceptions 216-217.

These were the only witnesses who testified upon this subject. The defendant Kirkland being rejected as a witness by the court upon the motion of the defendant Harry Toy. At the close of the government's case a motion was interposed for a directed verdict on behalf of each of the defendants Louie

Ding and Harry Toy and after argument was granted as to the defendant Toy and denied as to the defendant Louie Ding and exception allowed to this ruling, in favor of the defendant Ding.

In connection with the motion for a directed verdict on behalf of the defendant Louie Ding the following proceedings were had:

MR. RIDDELL (Attorney for Harry Toy): "I want first to strike the alleged declaration of the co-conspirators who have not been connected with the defendant Harry Toy by a *prima facie* case, and secondly, I move the court for a dismissal of the action on the ground that with that stricken out, or even with that in, there is not sufficient evidence to go to the jury.

There is a third proposition in here, which I don't know how fully it has come to the attention of the court, or how much your Honor has considered it, as the case has gone in, but a foundation has been laid for the present situation.

If the theory of the government is correct, Louie Ding was interested in the importation of five Chinese. If the theory of the government is correct, Harry Toy was interested in the importation of two men and the witness Lortie testified that he had no connection with Toy and the only man he knew in the case was Louie Ding until he went to Anacortes, or Van-



couver, and there found out for the first time that there were two other men in the transaction. There is absolutely no connection between the defendant Harry Toy and the alleged two men, and Ding, with his alleged five men. Now the indictment in the case charges a single crime. Then if there are two crimes, there is a failure of proof, and the defendants are entitled to a dismissal. There are a great many authorities on the point.

THE COURT: Well, now, we cannot entertain any presumptions against the defendant in the trial of a criminal case. The defendant is presumed to be innocent. If any presumption is indulged in, the presumption would not go beyond the testimony which shows that he was present and perhaps, would be that he was there or went there not for a wrongful purpose. If the defendant was charged and on trial for aiding and abetting the landing of Chinese, the testimony would be sufficient. That would be the completed offense. But the gist of this action is the conspiracy; it is not the bringing in; it is not the doing of anything other than the overt acts which are simply establishing the gist of the action or accusation, which is a conspiracy, and under these conceded facts I don't see how, in fact, and there is not in my judgment, anything on which the defendant could be held, or on which the court could

submit this to the jury, under the testimony which is presented. I think the motion to dismiss as against the defendant Toy must be sustained.

MR. RIDDELL: Mr. Bell and I have consulted concerning the other points to which I made reference regarding the indictment charging two alleged offenses, and as a courtesy to Mr. Bell, I would ask the court to consider that second motion as having been made on his behalf as attorney for the defendant Louie Ding, also.

THE COURT: Yes, and the motion is denied; note an exception.

Bill of exceptions, pages 273, 294, 295.

This was all the evidence in the case, and at its conclusion, the defendant again renewed said motion in writing, as above printed, to direct a verdict in his favor, and after the argument of counsel, both of the plaintiff and defendant to the court upon said motion, and also to the jury upon said motion, and also to the jury upon said case upon its merits, the said motion was by the court in its charge to the jury, overruled, and to which action of the court in overruling the same, the defendant then and there, by permission of the court, excepted."

Bill of exceptions, pages 344, 345.

Several witnesses were introduced by the Government and testified in reference to the kind or character of Chinese alleged to have been transported by the defendants from British Columbia to Seattle, as follows:

The defendant Louie E. Lortie, called as a witness in behalf of the Government, testified, *inter alia*, as follows, on direct examination:

“Q. (By Mr. Martin, Assistant District Attorney): How long have you known Ding?

A. Oh, not very long, a year, probably \* \* \*

Q. Do you know the defendant Kirkland in this case?

A. I do.

Q. Do you know the defendant Miller?

A. I do.

A. Kirkland came and asked me if I would help him get a load of Chinamen, so I went down to see Louie.

THE COURT: When you say ‘Louie,’ give the name.

A. Mr. Ding; and he said he would give me a letter to a friend in Vancouver. I could not get the letter that day and I told Kirkland I would get the letter later.

Q. Mr. Lortie, before leaving the interview with Ding, that day, tell me what Ding said, and what

the letter was for, and all that you said to him, and all that he said to you.

A. He told me he would get a letter, and he did not know how many he would get.

Q. How many what?

A. How many Chinamen.

Q. What else did he say? What was the letter for?

A. He said he would give me a letter to get eight.

Q. Eight what?

A. Eight Chinamen.

Q. Where?

A. In Vancouver, and that was about all. There was nothing more said, and I was to come back the next day. In the mean time, I went and told Kirkland I didn't get the letter, and I met him in Ballard.

Q. Had you the letter then?

A. No. I told him I could not go with him and he wanted to go because it was nice weather, and I said, 'You go on ahead, and I will catch you in Anacortes,' and he went away.

Q. Was Miller present at the interview between you and Kirkland?

A. Yes, Kirkland introduced Miller to me there that day.

Q. I asked you one question before that, how



long you had known Miller, what did you mean to answer in that connection?

A. Well, I lost track of Mr. Miller for several years, and, of course, I did not know who Kirkland was going to introduce me to, until that day, but, of course, when I met Miller that day, I recognized him, and told him I had known him for years. So Miller and Kirkland went down and I waited until that night, and I got the letter from Louie, and I took the 'Kulshan.'

Q. Before leaving that interview in which you received the letter, tell me all that Ding said to you concerning the letter, and during the interview?

A. Well, he did not say very much, only that he thought I would get eight, eight Chinamen.

Q. To whom was the letter directed or addressed?

A. To a man by the name of Louie.

Q. Describe the letter. What kind of a letter was it? Was it in an envelope? Describe the letter, or paper, as near as you can?

A. Well, I am not very positive of that letter, or whether it was in English or Chinese. I think it was in English, the number of it, and it called for Louie.

Q. It called for Louie?

A. Yes.

Q. Was it in an envelope?

A. I believe there was a Chinese letter, but I didn't see the letter, but Louie, in Vancouver, his nephew showed it to me.

Q. You saw the contents of the letter at the time of delivery?

A. Yes.

Q. And what was that? Did you see the letter delivered?

A. Yes.

Q. Then there was a letter in the envelope?

A. Yes.

Q. What else did Ding say at the time of the delivery of the letter?

A. He just told me to write the number on the envelope in English. It was on Carroll Street, and the number I don't remember, but I know it was on Carroll Street.

Q. How much were you to receive for the bringing in of the Chinese?

A. A hundred dollars.

Q. For how many?

A. Well, I wasn't positive, but I was to get eight.

Q. I mean, a hundred dollars would bring in how many Chinese?

A. A hundred dollars apiece.

Q. A hundred dollars apiece for eight Chinese?

A. Yes sir.

Q. Where did you receive the letter, in this city?

A. I think so; I know it was in the Milwaukee Hotel, known as the gambling house, in the office about the gambling house. I don't know the number.

Q. Do you know where Louie Ding's place of business is?

A. Well, that is the place.

Q. It is Louie Ding's place of business?

A. Yes. \* \* \*

Q. Is that in Chinatown in the city of Seattle?

A. Yes sir.

Q. After receiving the letter what did you then do?

A. I took the ten o'clock boat that night.

Q. For where?

A. Anacortes. I was to meet Kirkland and Miller.

Q. And did you go to Anacortes?

A. Yes sir.

Q. And what did you do then?

A. I found them there in Anacortes. I went with them to Vancouver, and when we got to Vancouver—

Q. Well, how did you go to Vancouver?

A. We went on Kirkland's boat.

Q. What was the name of the boat?

A. The "Maud K".

Q. Describe the boat briefly, and its dimensions?

A. It is between twenty and twenty-five feet long, and seven feet beam. A boat with a mast, and a Regal gasoline engine.

Q. Capable of going how fast?

A. Not very fast, maybe seven miles an hour.

Q. And capable of accommodating how many people?

A. You could crowd in about ten.

Q. It is a cabin boat?

A. Yes sir.

Q. And did you go on this boat to Vancouver?

A. Yes sir.

Q. Who went with you on the boat to Vancouver?

A. Mr. Miller and Mr. Kirkland.

Q. Arriving in Vancouver, what did you do?

A. I went to Carroll Street and to this particular number, I cannot remember the number. But I met this man Louie there.

Q. Had you any previous acquaintance with Louie?

A. No, I asked for Louie.

Q. You asked for him?

A. Yes, and he was rooming there in the back, and he came outside and talked with me on the street, and then we went the back way—



Q. What did this man Louie say?

A. He told me he would gather the boys up. He told me up to his room he would gather the boys up.

Q. How many boys?

A. He could not get eight. He only got five.

Q. What arrangements did you make with him for the delivery of these boys, or men?

A. I was to deliver them to Louie Ding.

Q. What did you do immediately at that time with the men, pursuant to your talk with the Vancouver Louie?

A. Well, as near as I can recollect, I introduced Mr. Kirkland to him, and Kirkland told us that he had two, and that he would get the two, and he told me it was on Pender Street. I think it was 19½ Pender Street. And he went and got his two. He told me he got the two already.

Q. And what was done with them?

A. I took care of the other five. They came down on a street car, I believe. I met them at the end of the street car line, and I took them down to the boat, and put them on the boat, and shortly after, Kirkland came down with his two.

Q. And were they placed on the boat?

A. Yes sir.

Q. Do you know who these Chinese people were, or what their business was?

A. No, not their particular business. I know they were coming over here to America.

Q. Were they the laboring class of Chinese, do you know?

A. Well, I could not say.

Q. You knew they were coming to the United States?

A. Yes. Some of them seemed to be pretty intelligent, and others were not.

Q. What did Kirkland and Miller then do, if you know?

A. I left them there and took the steamer, and told them I would come on ahead and when they got in I would take the five off, and Kirkland told me his man would come down to the boat and take care of them.

Q. What did you do upon your arrival in Seattle?

A. I went home.

Q. Did you after that receive any information of any sort from Miller or Kirkland?

A. Yes. I received a telephone from Kirkland.

Q. What did he say?

A. He asked me to come down to the boat.

Q. Where was the boat?

A. At the foot of Harrison Street.

Q. And what else did he say to you, if anything?

A. There wasn't much said.

Q. After you received Kirkland's telephone call, what did you then do?

A. I went down to the boat and I got the five Chinamen.

Q. When you arrived at the boat what time of the evening was it, do you remember.

A. No, I don't remember. It was dark.

Q. What time in the month, and when, did this meeting at the foot of Harrison Street, at this landing, take place?

A. As near as I can recollect it was some time in October.

Q. Of what year?

A. 1915.

Q. Last year?

A. Yes sir.

Q. And was it after dark?

A. Yes sir.

Q. And you cannot remember the date of the month?

A. No, I cannot.

Q. What did you see on arriving at the foot of Harrison Street? Where was the boat, and where were these several persons?

A. The boat was anchored, and I just met Mr. Miller there.

Q. Where was Kirkland?

A. Kirkland hadn't got down yet.

Q. Did you see him there?

A. I did, before I got away.

Q. Did you see any of Kirkland's Chinese?

A. No.

Q. How many Chinese, if any, did you see on arriving at the boat?

A. Just the five.

Q. Just the five?

A. Yes sir.

Q. Did you have any talk with Miller?

A. Yes. Miller told me that Kirkland had been down and got his Chinamen.

Q. What did you do then?

A. I took the five and went on up as far as the Milwaukee Hotel on a vacant lot on the west side of the Milwaukee Hotel.

Q. How did you go from Harrison Street to the Milwaukee Hotel?

A. I walked.

Q. With the Chinese?

A. Yes.

Q. And showed them the way?

A. When I got there, I left them standing outside and I went in to Louie Ding's place, and couldn't find Louie Ding, and China Dan came out and took care of them.

Q. And you delivered them to him?



A. I was to deliver them to Louie, but I could not find Louie.

Q. By Louie, you mean Louie Ding, the defendant?

A. Yes. So, I got China Dan, and he said he would take care of them.

Q. Did you deliver the five Chinese to him?

A. Yes sir. I introduced them to him, and I showed him where they were and he talked Chinese to them, and I left them in his care.

Q. Did you see Ding or any of these Chinese that you brought in after that, or China Dan?

A. Yes.

Q. When, and under what circumstances?

A. I seen them afterwards in a flat on Main Street, at 1037.

Q. You say you met Dan and Ding afterwards at the flat at 1037 Main Street. How long was that after the night of the arrival of the Chinese?

A. A couple of nights after. A couple of days after.

Q. What time of the day?

A. In the evening.

Q. Who was present at the meeting?

A. China Dan and Louie.

Q. The defendant, Louie Ding?

A. Yes sir.

Q. Is that China Dan the same man you referred to a moment ago?

A. Yes sir.

Q. The man to whom you delivered the five Chinese?

A. Yes sir.

Q. Were there any other Chinese persons present?

A. I could not say. I don't remember.

Q. Were there any of the co-defendants, Worthington or Miller?

A. Mr. Miller wasn't present.

Q. Did Mr. Miller see you at the flat?

A. Yes sir.

Q. How many meetings took place at the flat?

A. Oh, probably a week later, Mr. Miller and I went over to the flat.

Q. Is that the same place, 1037 Main Street?

A. Yes sir.

Q. What time of day was that?

A. That was in the evening.

Q. And who was present during that interview?

A. Mr. Miller and I, and Louie.

Q. Do you remember whether China Dan was present or not?

A. No.

Q. Do you remember, or was he not there?

A. I don't remember.

Q. Was anything done or said on this occasion

concerning the five Chinese you had delivered to China Dan?

A. Yes sir. I received some money.

Q. State everything that was said and done on that occasion?

A. Well, Louie owed me two hundred dollars yet, and he paid me that two hundred dollars on my five Chinamen.

Q. Had you received any money before that?

A. Yes.

Q. When?

A. The first time I met him.

Q. At the first interview you met him?

A. Yes.

Q. And that was at the flat?

A. Yes.

Q. And how much did you receive at the first interview after you had delivered the Chinese?

A. Three hundred dollars.

Q. And on this later occasion you received two hundred?

A. Yes.

Q. Who paid you the money?

A. Louie.

Q. In what denomination was the money, what kind of money was it?

A. Gold.

## ON CROSS EXAMINATION.

Q. (By Mr. Bell, attorney for Louie Ding): Did Kirkland know you were in the business?

A. I don't know.

Q. And you say it is not a fact that you were the one that suggested to Kirkland that he join you in this venture?

A. I could not say which one. We talked about it.

Q. I thought you told Mr. Martin that Kirkland came to you and told you that he was going to take some boys across, some Chinamen, and wanted you to go in with him. That is what you said to Mr. Martin, isn't it?

A. No.

Q. When was this that you had the talk with Ding about bringing over eight Chinamen?

A. Early in October.

Q. And when was it you told him, on your visit to the flat, after you got back, or where were you when you told him about the other two Chinamen?

A. In the flat on Main Street.

Q. And that was after you had delivered the Chinamen to China Dan?

A. Yes sir.

Q. And it was after you had received part of your money?

A. Yes sir.

Q. Where were you when you received the first three hundred dollars?

A. I could not swear to that, whether it was in the gambling house, or at the flat. I am not positive, but I know I received it because I know he owed me two hundred dollars more.

Q. How soon after you delivered the five Chinamen to China Dan was it that you received the three hundred dollars?

A. It was several days afterwards."

See Bill of exceptions, pages 161 to 179, inc., and pages 185, 186.

The defendant Melvin B. Miller, called as a witness in behalf of the Government, testified, *inter alia*, as follows:

#### ON DIRECT EXAMINATION.

"Q. (By Mr. Martin, Assistant District Attorney): And do you know the defendant Lortie in this case?

A. Yes sir.

Q. And the defendant Kirkland?

A. Yes sir.

Q. And the defendant, Harry Toy?

A. Yes sir.

Q. And the defendant, Louie Ding?

A. Yes sir.



Q. Did you ever have anything to do with this conspiracy to smuggle the Chinese mentioned in this indictment?

A. I did.

Q. When did you first have any connection with these men, and this conspiracy, and what was it?

A. I don't just rememebr the date, but I was in the Louvre Bar, and Mr. Kirkland came in and asked me whether I wanted to make a piece of money, and I told him I did. \* \* \*

A. We left the saloon and went down on a launch and went to Vancouver. \* \* \*

Q. Did you meet Lortie that night or before that at any time?

A. I met Lortie in Ballard.

Q. On the night you left?

A. On the morning we left. We met Lortie in the morning and that evening we left for Vancouver.

Q. Where did the meeting take place between yourself and Lortie?

A. Right by the City Dock there.

Q. Where was Mr. Kirkland at that time?

A. He was there.

Q. Was he present during the interview?

A. He introduced me to Lortie.

Q. What did Lortie or Kirkland say on that occasion?

A. Well, they made arrangements to go to Vancouver to get some Chinamen.

Q. What did Lortie say?

A. Lortie said he had a letter for eight.

Q. From whom?

A. From Mr. Ding.

Q. For eight what?

A. Eight Chinamen.

Q. For eight Chinamen?

A. Yes sir.

Q. And what did Mr. Kirkland say as to any letters he had?

A. Mr. Kirkland didn't say anything to Lortie at the time, but Mr. Kirkland told me he had an order for two.

Q. From whom?

A. Mr. Toy.

Q. Mr. Toy, the defendant, Harry Toy?

A. Yes sir.

Q. When did Lortie tell you that?

A. Lortie didn't tell me that.

Q. I mean, when did Kirkland tell you that?

A. On the trip going over.

Q. What was Lortie to get for his Chinese?

A. One hundred a head.

Q. What was Kirkland to get for his?

A. A hundred and twenty-five.

MR. RIDDELL: I think counsel should ask for what was said and done. Counsel is practically testifying.

THE COURT: He may state what was said and done.

Q. (Mr. Martin): State everything that Lortie said about his Chinese, and about Ding, and about everything that was said?

A. They just talked on the trip over, they were trying to keep it a secret from each other, that one had a certain party and the other had a certain party, and they wanted to keep it from each other.

Q. Lortie told you about his Chinamen and Kirkland told you about his Chinamen?

A. Yes, Lortie told me about his Chinamen, and Kirkland told me about his Chinamen.

Q. Were you shown any letters, or were they exhibited by the men?

A. Yes.

Q. What letters do you refer to?

A. I refer to the letter Lortie had from Ding.

Q. Did you examine it, or read it?

A. No, I didn't examine it, or read it.

Q. And Lortie had received a letter from Ding?

A. Yes sir.

Q. Now, what, if anything, did Kirkland say about his Chinese?

A. Kirkland had a letter from Vancouver, I

saw the letter, but I didn't see him open it. He showed me the letter.

Q. State what Kirkland told you about his Chinese, or about the letter?

A. He said he had two Chinamen to bring over for Harry Toy and was to get a hundred and twenty-five dollars apiece for them.

Q. Did you later on that day leave Seattle and go anywhere?

A. We was in Ballard, we all got up in the morning, I don't remember whether it was the 5th, or 6th, and the next morning Lortie came out and we left that evening, and went to Anacortes, and landed there, and stayed all night in Anacortes.

Q. You went to Anacortes in a boat, did you?

A. We went to Anacortes on a launch.

Q. What launch?

A. The 'Maud K.'

Q. Mr. Kirkland's launch?

A. Yes sir.

Q. What did you do there?

A. We stayed there until the next morning.

Q. What did you then do?

A. We went up town and had something to eat, and got down and went on the boat and went to Vancouver.

Q. And arriving in Vancouver, what was done?

A. We arrived in Vancouver about seven o'clock

in the morning, and I stayed on the launch, and Kirkland went up town, and that evening Mr. Kirkland, he brings two boys down, and put them on board, and then Mr. Lortie brings five down and puts them on board. I never went up town at all.

Q. What kind of persons were these who were put on board?

A. Chinamen.

Q. What kind of Chinamen?

A. What kind of Chinamen?

Q. Yes.

A. Just ordinary Chinamen, as near as I know. Chinese.

Q. Do you know whether they were Chinese laborers or not?

MR. BELL: We object to that as suggestive and leading.

A. I suppose they were.

THE COURT: It is leading. Just state what was said.

A. I supposed they were laboring Chinamen. They looked like.

MR. BELL: I move that be stricken. He says he supposed.

THE COURT: Let the answer be stricken as to what he supposes.

MR. MARTIN: He says they looked like Chinese laboring men.



A. They were very poorly clad, you know.

MR. MARTIN: Do I understand that the witness's answer stands that they looked like Chinese laborers?

THE COURT: The remark that they looked like laborers, should be stricken in view of the motion.

MR. MARTIN: Just a moment. May not the witness testify to the appearance of the Chinese?

THE COURT: Yes, he may state what he saw.

MR. MARTIN: What did you do after the Chinese were placed on board at Vancouver.

A. After the Chinese were placed on board at Vancouver we pulled out of Vancouver about eight or nine o'clock at night, and Mr. Lortie was to take the boat, the Vancouver large boat from there to Seattle, and Mr. Kirkland and I pulled out to about the lightship, and it got rough, and we turned back and we didn't leave until about ten o'clock the next morning, and then we came across.

Q. Did you stop anywhere en route to Seattle?

A. We stopped, I think, at Orcas Island and camped there from four o'clock in the evening, until nine or ten o'clock the next morning.

Q. Did the Chinese go ashore at all?

A. No.

Q. Where did you go when you arrived in Seattle, and what did you do?

A. We landed at the foot of Harrison street, and Mr. Kirkland got off the boat and he went up town, and Mr. Lortie came into the boat. Before that Kirkland took his two boys ashore, you see, and he goes up town, and the seven of them was on shore, and Kirkland brings Mr. Toy and some other Chinamen down and takes the two boys away, and Mr. Lortie comes down and takes the other five away.

Q. And what did you do?

A. I went back on the boat and went to sleep.

Q. Where were the Chinese delivered; what part of the city?

A. I could not tell you as to that.

Q. I mean where did you land?

A. We landed at the foot of Harrison street.

Q. You landed at the foot of Harrison street in this city?

A. Yes, sir.

Q. Following the arrival on that evening, did you at any time see any of those Chinamen that were brought down on the boat with you, that were brought down on your launch? Did you see any of those Chinese after that?

A. Yes, sir.

Q. Where and under what circumstances?

A. I saw them at 1037 Main street.

Q. And what was the occasion of seeing them there? Who else was present?

A. I went there with Mr. Lortie to collect some money from Mr. Ding, and Mr. Ding paid him two hundred dollars in gold.

Q. Who else was there besides Mr. Ding?

A. China Dan and Louie Lewis.

Q. Who?

A. That little Chinaman who was on the stand not long ago.

Q. You mean Louie Lung Gin.

A. Yes, Louie Lung Gin.

Q. How many Chinese were there?

A. Three or four.

Q. How many of those did you recognize as Chinese you had seen before?

A. All that was there.

Q. Were those the Chinese that had been brought down on the boat?

A. Yes, sir.

Q. What did Ding and Lortie say when this money was paid?

A. There was a balance to be paid, I forget how much it was. \* \* \*

#### ON RE-RE-DIRECT EXAMINATION.

Q. (By MR. MARTIN, District Attorney)  
“What was done and said by Kirkland, if anything, when he came down with the man whom you know was Toy?

A. Well, they asked for the boys. The boys were laying along on the rocks, and they got up, and they appeared to know Mr. Toy, or they shook hands with each other.

Q. And what did Kirkland say to Toy at that moment, or in his presence, or while he was there?

A. I could not say what was said. They all went off together."

See bill of exceptions, pages 208 to 215, inc. and 229.

The foregoing is all of the testimony introduced by the Government upon this question.

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MR. RIDDELL: (Attorney for Harry Toy) Do I understand you want to put both Ding and Toy on trial at the same time?

MR. MARTIN: (United States District Attorney) Yes.

MR. RIDDELL: I want to move for a severance at this time. I understand that the only two defendants on trial at this time before this jury are the defendants Toy and Ding?

MR. MARTIN: Yes.

MR. RIDDELL: I want to move for a severance at this time.

THE COURT: What is the reason; on what ground?

MR. RIDDELL: The reason I want to move

for a severance is very plain, and will be very plain to your Honor, if your Honor considers for a moment. The jury which is about to be impanelled has already passed upon another case with which we have nothing to do, and in which we had absolutely no opportunity to examine any witness or take any part in the proceedings, and the defendant Ding is now put on trial with us and we are brought into this thing together with him, at the same time. The facts in this case are, we have nothing to do with him, don't know him in the transaction, never heard of him, and the placing of us on trial with this man, cannot help but be prejudicial.

THE COURT: I think you are a little apprehensive before there is any occasion for it.

MR. RIDDELL: I suppose your Honor will compel us to join in the challenges. Under the present circumstances, in view of the present situation he may have his preference on account of what has occurred, which would be absolutely foreign to our interests.

MR. MARTIN: I might suggest that the United States Circuit Court in cases well known to counsel and also to the court, as your Honor recalls held that separate trials would not be granted even in a murder case, even where they are jointly charged; I just mention that.

THE COURT: I don't see where the court



would be justified, Mr. Riddell, in granting a severance.

MR. RIDDELL: I do not know at the present time what the testimony in the case may develop, but will say there may be situations which would render it exceedingly prejudicial to us to be dragged in here with somebody else in this way. I want to make my motion—

THE COURT: Motion denied.

MR. RIDDELL: Save an exception, your Honor.

THE COURT: Note it. \* \* \*

(Bill of Exceptions 2 and 3).

\* \* \* \* \*

THE COURT: The defendants' first peremptory challenge?

MR. BELL: At this time, before starting in on the peremptory challenges on behalf of the defendant whom I represent I desire to inquire of the Court whether we will be permitted to have for that defendant the number of peremptory challenges allowed us by the statute, which is ten in number?

THE COURT: The defendants will join in the challenges, and have the number which the statute gives.

MR. RIDDELL: We will be required to join?

THE COURT: Yes.

MR. RIDDELL: We desire to exercise our ten independently of the other defendants in the case.

THE COURT: No, you have ten in all; you will exercise them together.

MR. BELL: We will take an exception.

MR. RIDDELL: We desire to exercise ours independently of the other defendant; there is absolutely no community of interest; no connection whatever.

THE COURT: I have nothing to do with the law or an indictment, simply have to take them as we find them. The law provides the challenges that are allowed to a defendant, and when there are several defendants they unite and join in the challenges. Proceed.

MR. RIDDELL: Your Honor, we must both agree on the person we desire to challenge?

THE COURT: Yes.

MR. RIDDELL: I desire to preserve my exception to your Honor's ruling. Your Honor is undoubtedly correct.

THE COURT: Yes.

MR. RIDDELL. We will excuse Mr. Manca.

\* \* \*

THE COURT: Defendant's second peremptory challenge.

MR. RIDDELL: Excuse Mr. Robinson.

\* \* \*

THE COURT: Defendants' third peremptory challenge.

MR. BELL: We excuse Mr. Newfang.

\* \* \*

THE COURT: The defendants' fourth peremptory challenge.

MR. RIDDELL: Excuse Mr. Hughes.

\* \* \*

THE COURT: The defendants' fifth peremptory challenge.

MR. BELL: We will excuse Paul Myhra.

\* \* \*

THE COURT: The defendants' sixth peremptory challenge.

MR. RIDDELL: We will excuse Mr. Sackett.

\* \* \*

THE COURT: The defendants' seventh peremptory challenge.

MR. BELL: The defense will excuse Mr. Alexander.

\* \* \*

THE COURT: The defendants' eighth peremptory challenge.

MR. RIDDELL: Excuse Mr. Wilmot.

\* \* \*

THE COURT: The defendants' ninth peremptory challenge.

MR. BELL: We will excuse Mr. Daly.

\* \* \*

THE COURT: The defendants' tenth and last challenge.

MR. RIDDELL: We will excuse Mr. Elfendahl.

(See Bill of Exceptions, pp. 71 to 135).

MR. RIDDELL: Before the jury is sworn, I want to make a statement to your Honor. I don't want to make it in the presence of the jury. It is a matter of law that concerns the court alone, and I don't want to prejudice the jury against the Government, and I think it is only fair to tell the court that the jury should be excluded.

THE COURT: (addressing the jury) You may retire from the court room. (The jury then retired.)

MR. RIDDELL: In this case we have asked for a severance, which the court has declined, and we have asked the court to allow us ten challenges on each side, that is, for each defendant, and the court has made us join in our challenges. The result has been that the attorneys representing Louie Ding have challenged five, and we have challenged five, and we desire to exercise another peremptory challenge against the juror, Mr. Dyer. Your Honor has already intimated the result of the ruling, and I do not desire the jury to be prejudiced by the naming of any particular juror in this matter, although I assumed that your Honor would rule against us.

THE COURT: Is there any objection on the part of the Government?

MR. MARTIN: Yes, your Honor.

THE COURT: The request is denied.

MR. RIDDELL: We desire to save an exception against your Honor's ruling.

MR. BELL: We make the same request.

THE COURT: The request is denied.

MR. BELL: We will ask for an exception also."

(Bill of Exceptions, 146-147).

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MR. MARTIN: (United States District Attorney) "I will call Mr. Kirkland.

MR. RIDDELL: Before this witness is sworn, I want that question passed upon that I raised this morning.

MR. MARTIN: I offer Mr. Kirkland as a witness and I ask that he be administered the oath.

MR. RIDDELL: We want a preliminary inquiry on the objection we made this morning.

THE COURT: What is the objection?

MR. RIDDELL: The objection is that the witness does not believe there is a Supreme Being who will reward or punish him for his acts in this world, either in this world or the next, and consequently the oath lacks the sanctity of an oath to him, and I have the testimony here, to proceed with the preliminary inquiry which the law requires in the matter.



MR. MARTIN: Do you care to hear from me, your Honor? If the Court please, at the early common law, it may have been adhered to, but in more recent times the common law—but in more recent times I have never heard of the procedure outlined, or suggested by counsel, that before the witness becomes a witness, that the court is going to interrupt the trial and listen to the triers of that fact. It is usual to swear the witness. That has been my experience, and qualify him, and if the witness believes in the sanctity of an oath, his own statement, as to that fact, is the very best evidence, and I call your Honor's attention to the frequency with which Chinese testify. It is a known fact that the Chinese do not believe in our God, but believe in Confucius and Buddha and other pagan Gods, and yet they believe in the sanctity of an oath, and I think this witness should not be disqualified if he believes in the sanctity of an oath. A witness can affirm if he believes in the pains and penalties of perjury, that is sufficient.

THE COURT: Mr. Kirkland, do you believe in a God and a future state of reward or punishment?

A. Why, I believe there is a Creator, a cause for all that we see, and all that we hear.

Q. And one who rewards truth and punishes falsehood?

A. Well, I don't know about that.

Q. Neither in this world or the next?

A. I think a man gets all his punishment in this world, while he is here.

Q. Do you believe in the existence of a Supreme Creator?

A. I believe there is something, but I am not convinced what it is.

Q. A Supreme Being?

A. A Supreme Being, or Creator, or whatever has caused us to be here.

Q. And you believe that that Creator, or Being, in which you believe rewards truthfulness, and punishes falsity?

A. Well, your Honor, to be frank with you, I think you get your punishment on earth.

Q. I don't care where you get it. I am just asking you whether you believe there is a Supreme Being who does reward those who speak the truth, either in this life, or some life hereafter, or who punishes those who speak falsely either in this life, or hereafter?

A. I don't believe there is any reward, or any punishment, hereafter.

Q. You will answer my question. I asked whether you believe there is a Supreme Being who rewards or punishes in this life or hereafter?

A. It is in this life.

Q. Do you believe there is a reward or punish-

ment in this life, a reward for those who speak the truth, and punishment for those who speak falsely?

A. Yes, they get along nice and everything is better for them if they speak the truth.

MR. RIDDELL: I don't mean any disrespect to your Honor, but I want to object to your Honor taking the examination out of my hands, and I make this most respectfully. The Court has taken the matter out of the hands of the attorney.

THE COURT: The Court is the person who must be satisfied and who should conduct the matter, and it may be so recorded in the record.

MR. RIDDELL: I assume I will be permitted some questions when your Honor has finished.

THE COURT: Let me ask this question again. Do you believe, or do you disbelieve, in the existence of a God who is the rewarder of truth and the avenger of falsehood, either in this life or in the hereafter. Now, you can answer that directly?

A. Why, I cannot come to believe that a man is rewarded or punished in the hereafter. I believe that there is a Creator and a cause for all of us.

Q. I have told you to answer my question, and you evade it. I asked directly and very pointedly, whether you did believe in the existence of a God who is the rewarder of truth and the avenger of falsehood either in this life or hereafter?

A. Well, I believe a man is rewarded in this life, as I said before.

Q. And you believe he is avenged in this life for falsity?

A. Yes, if he speaks false, it is only a matter of time until he is in trouble. I believe a man can tell the truth just as well without an oath as with it. I know that I can.

Q. Do you place any sanctity in an oath?

A. Yes, I believe you have to have something like that if a man is a God-fearing man, as they call it, to make him appreciate the seriousness of what he is doing.

Q. Are you God-fearing?

A. I don't think so.

Q. Then do you believe in the sanctity of an oath?

A. Yes, I believe a man can tell the truth.

Q. Why do you believe in the sanctity of an oath?

A. I don't know as I can answer that satisfactorily. I believe when a man holds his hand up to the Creator, or whoever it may be that is the cause of our existence here, that he should tell the truth.

Q. Well, suppose he does not?

A. Well, his conscience should prick him enough to cause him considerable anguish and punishment, I think.

Q. Do you want to ask any questions, Mr. Riddell?

MR. RIDDELL: Mr. Kirkland, as a matter of fact, your belief is, that the punishment, you say comes in this world comes from yourself and the men in the world?

A. Yes.

Q. And not from God?

A. No, I don't think it comes from God.

MR. RIDDELL: That is all.

MR. MARTIN: Do you believe that your punishment lies in your own conscience or from a conscious existence of a Supreme Being?

A. Yes.

MR. MARTIN: I submit there is many a religious man whose belief does not extend beyond that and is a good citizen.

THE COURT: It is not a question of citizenship.

MR. RIDDELL: It is purely a question of law.

THE COURT: You said awhile ago, and your last answer does not coincide with the answer you gave awhile ago, that you believe there is a Supreme Being that does avenge falsehood.

A. There may be.

Q. But do you believe there is? That is what I want to know, whether you believe there is?

A. I am doubtful.

THE COURT: It is recognized in this and all religious countries a man must recognize a Supreme



Being who does avenge falsity, and a man cannot stand out on his own initiative.

MR. MARTIN: But Chinese who take the stand repeatedly do not believe in our God.

THE COURT: But they have a God in which they do believe.

MR. MARTIN: But he says he believes in a Supreme Being.

THE COURT: I have asked him repeatedly.

MR. MARTIN: I would like leave to examine the witness further.

THE COURT: You may propound further questions.

Q. (By Mr. Martin) You said in answer to the Court's question you believe in punishment by your own conscience?

A. Yes, sir.

Q. You believe that that punishment is due to the existence of a Supreme Being acting through your conscience?

A. There is something, I don't know what it is.

Q. And that Supreme Power, acting through your conscience, leads you to believe that it is better to tell the truth because of the results which may follow?

A. It may follow, yes, I don't know,—

Q. And because it will follow—

MR. RIDDELL: Let him finish his answer.

MR. MARTIN: You have no right to interrupt.

THE COURT: Let him finish his answer. Proceed.

A. I don't know what the hereafter is.

THE COURT: We are not asking you about that. I am asking the condition of your mind at the present time as to your belief in a future state?

A. Just as I have told you as I have already told you, I believe there is a Creator, or a cause for us existing here, which any reasonable man would know, but what it is, I don't know. I doubt all their religious ways they have of knowing who the man is.

THE COURT: I don't care anything about that.

A. Or who the Being is, or what it is.

THE COURT: I simply wanted to know if your conscience is affected by the realization and appreciation that there is a Supreme Being that overrules and directs your conscience, and that is what I want to know. And that your either favorable or unfavorable conduct in this life will be rewarded or avenged hereafter.

A. I don't think that you are rewarded or avenged in the hereafter.

THE COURT: Do you think you are in this life?

A. I believe that a man is. His good acts in

this life will show among his fellow men, and he will get along a great deal better, and he is rewarded in other ways. I think if a man is good he will be rewarded with good, and if he is bad he is punished by this rule on this earth.

MR. MARTIN: And punished by reason of a Creator, or Supreme Being which controls the Universe?

THE COURT: And that belief in you, is that emphasized or modified in any way by the sanctity of an oath, strengthened in any way by the sanctity of an oath?

A. I think that a man—

THE COURT: Oh, no, not that a man, do you feel that holding up your hand and swearing before God that you will tell the truth, the whole truth, and nothing but the truth, does that mean anything to you?

A. It don't mean a great deal to me. I think I can tell the truth if I never took an oath.

Q. I don't care anything about that. I don't believe you can establish this witness, Mr. Martin, under the rule of common law.

MR. MARTIN: I would like to be heard on that, because one court in Milwaukee held that the qualifications of a witness were those of common law, yet the Supreme Court held that a person convicted of a felony could testify, while in the McKesley case, they held that it could not be done.

THE COURT: Before coming to a conclusion on this, I haven't gone through the subject, but you will find it discussed in the Second Cushing Massachusetts, and you will find it also in the 14th American State Reports—

MR. MARTIN: The Courts in modern times have come to this, and this question is frequently put, "do you appreciate the pains and penalties of perjury?" Take the case—

THE COURT: Don't interrupt. Just a moment, Mr. Martin I said I would hear you, when you look into the matter. I will withhold final conclusion on this until I hear from you.

(Bill of Exceptions 200 to 207).

(See page 16 *supra* for ruling of court.)

MR. BELL: (Attorney for Louie Ding) I will call William Kirkland, this witness is under subpoena, and we wish to call him in behalf of the defendant Louie Ding.

MR. MARTIN: The witness is William Kirkland, whom your Honor held this morning to be disqualified.

THE COURT: Call the next witness.

MR. BELL: We desire to have him here and offer him as a witness.

THE COURT: If he is the same witness tendered by the Government, and the Court declined to receive him, unless the Government agrees, I will not allow him to testify.

MR. BELL: Let the record show that we offer him for the defense.

MR. MARTIN: We will object to his being sworn.

THE COURT: Let the record show that this is the same witness tendered by the Government, and the defense objected and the Court sustained the objection, and declined to allow him to testify.

MR. BELL: He was not challenged by the defendant, Louie Ding.

THE COURT: He was challenged by the defendant Harry Toy.

MR. BELL: We did not join in that challenge and we desire to offer him as a witness, and we will take an exception to your Honor's ruling to not allow him to testify.

THE COURT: Note an exception.

Bill of Exceptions, pp. 325-6.

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The jury retired to consider their verdict, and having returned into court a verdict against the defendant Louie Ding, afterwards, on, to-wit: the 12th day of June, 1916, the defendant Louie Ding by his attorney moved the court to set aside said verdict and grant a new trial, which said motion was in form as follows:



“UNITED STATES OF AMERICA,

vs.

MELVIN B. MILLER, WM. KIRKLAND,  
LOUIE E. LORTIE, HARRY TOY AND  
LOUIE RING,

No. 3299

“Comes now the defendant Ding and moves the court to set aside the verdict of the jury herein returned on the 8th day of June 1916, and grant a new trial for the reasons and upon the following grounds:

1. That said verdict was against and contrary to law. II. That said verdict was against and contrary to the evidence. III. Insufficiency of the evidence to justify the verdict. IV. Error of law occurring during the trial and excepted to at the time by the said defendant. V. Erroneous instructions given to the jury by the trial judge. VI. Variance between the indictment and the proof introduced at the time of the trial. VII. Misjoinder of the party defendant. VIII. Misjoinder of separate and independent offenses.

WILLIAM R. BELL,

Attorney for Defendant”

which said motion for a new trial was, after arguments by counsel for and against the motion respectively, and after due consideration by the court, on the 22nd day of June 1916, overruled.

And now, in furtherance of justice, and that right may be done the defendant, Louie Ding, tenders and presents the foregoing as his bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this, the 1st day of September 1916.

JEREMIAH NETERER,

Judge.

(Bill of Exceptions, 358-361.)

#### **STIPULATION.**

It is stipulated by and between the plaintiff in the above entitled cause, and the defendant Louie Ding through their respective attorneys, that the foregoing, being those portions of the original bill of exceptions herein which support the defendants' assignment of errors, is all of the original bill of exceptions that need be incorporated in the printed record on appeal.

Dated at Seattle, this 13th day of November, 1916.

CLAY ALLEN and WINTER S. MARTIN,  
Attorneys for Plaintiff.

WALTER S. FULTON and WM. R. BELL,  
Attorneys for Defendant Louie Ding.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, North-

ern Division, Dec. 14, 1916. Frank L. Crosby, Clerk.  
By Ed M. Lakin, Deputy.

**PETITION FOR WRIT OF ERROR.**

To the Honorable JEREMIAH NETERER,  
Judge of the District Court aforesaid:

Now comes the defendant Louie Ding, by his attorneys, Walter S. Fulton and W. R. Bell, and respectfully shows that on the 2nd day of June, 1916, a jury duly impanelled herein found your petitioner guilty of criminal conspiracy and upon said verdict a sentence was passed and final judgment was entered against your petitioner on the 12th day of June, 1916.

Your petitioner feeling himself aggrieved by said verdict and judgment entered thereon as aforesaid herewith petitions the court for an order allowing him to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error be issued and that an appeal in this behalf to the Circuit Court of Appeals aforesaid, situated in San Francisco in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made approving the bond heretofore furnished by your petitioner and staying all further

proceedings until the determination of said writ of error by the said Circuit Court of Appeals, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

WM. R. BELL and  
WALTER S. FULTON,  
Attorneys for Defendant Louie Ding.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*United States District Court, Western District of  
Washington, Northern Division.*

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

MELVIN B. MILLER, WILLIAM KIRKLAND,  
LOUIE E. LORTIE, HARRY TOY and  
LOUIE DING,  
Defendants.

No. 3299

**ORDER ALLOWING WRIT OF ERROR.**

NOW on this 8th day of November, 1916, came the defendant Louie Ding, and by his attorneys Walter S. Fulton and W. R. Bell, filed herein and presented to the court his petition, praying for the allowance of a writ of error intended to be urged

by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises; and that an order be made approving the bond heretofore furnished by the defendant Louie Ding and staying all further proceedings until the determination of said writ of error by the said Circuit Court of Appeals.

NOW, on consideration of said petition and being fully advised in the premises, the Court does hereby allow the said writ of error.

And it is hereby ordered that the security heretofore furnished by the defendant Louie Ding for his appearance whenever required according to the conditions of his bond, is hereby approved, and all further proceedings are hereby suspended herein until the determination of said writ of error by the said Circuit Court of Appeals.

And it is further ordered that the defendant Louie Ding shall be released from custody pending the hearing and determination of said writ of error.

**JEREMIAH NETERER,**

Judge of the United States District Court for the Western District of Washington, Northern Division.

Indorsed: Order Allowing Writ of Error.



Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

### **ASSIGNMENT OF ERRORS.**

Now comes the defendant Louie Ding and in connection with his petition for writ of error in this cause assigns the following errors which said defendant avers occurred on the trial thereof and upon which he relies to reverse the judgment entered herein, as appears of record.

#### **I.**

That the court erred in overruling the motion of the defendant Louie Ding for a separate trial, which motion was made immediately after the opening statement by the attorney for the plaintiff and before the introduction of any evidence, the said opening statement disclosing that the facts relied upon by the plaintiff for a conviction would establish two separate and distinct conspiracies, one entered into by the defendants Toy and Kirkland and the other entered into by the defendants Ding and Lortie. Due and timely exception was taken to the action of the trial court in overruling the defendant Ding's motion for a severance.

#### **II.**

The court erred in overruling the motion of the defendant Louie Ding for a directed verdict made

at the close of the evidence introduced by the government in support of the indictment, which motion was based upon the following several grounds:

a. Improper joinder of two separate and distinct felonies;

b. Insufficiency of the evidence to establish any conspiracy between the defendant Ding and the other defendants.

c. Insufficiency of the evidence to establish that the Chinese alleged to have been transported from the city of Vancouver, B. C. to the city of Seattle, belonged to a prohibited class of aliens;

d. That the alleged conspiracy to import alien Chinese had been consummated and merged into the substantive offense of importing aliens.

### III.

The court erred in overruling the motion of the defendant Louie Ding for a directed verdict of acquittal made at the close of the entire case and before it was submitted to the jury which motion was based upon the following grounds:

a. Improper joinder of two separate and distinct felonies;

b. Insufficiency of the evidence to establish any conspiracy between the defendant Ding and the other defendants;

c. Insufficiency of the evidence to establish that the Chinese alleged to have been transported from

the city of Vancouver, B. C. to the city of Seattle, belonged to a prohibited class of aliens;

d. That the alleged conspiracy to import alien Chinese had been consummated and merged into the offense of importing aliens.

#### IV.

The court erred in requiring the two defendants on trial, Harry Toy and Louie Ding to divide between them the number of statutory peremptory challenges, for the reason that there was no connection between the said defendants, and the offenses alleged to have been committed by them were separate and distinct felonies.

#### V.

The court erred in permitting a number of jurors, over the objection of the defendant Louie Ding, who had sat as trial jurors in the case immediately preceeding the one on trial, in which the United States of America was plaintiff, and the defendant Louie Ding was one of the defendants and in which the issues and the evidence were identical with this case to be impanelled and sworn in this cause.

#### VI.

The court erred in refusing to permit William Kirkland to testify when called as a material witness on behalf of the defendant Louie Ding.

## VII.

The court erred in denying the motion of the defendant Louie Ding for a new trial, which motion was made in due time, after the jury had returned a verdict of guilty as charged in the first count of the indictment, upon the following grounds:

(1) That said verdict was against and contrary to law; (2) That said verdict was against and contrary to the evidence; (3) Insufficiency of the evidence to justify the verdict; (4) Error of law occurring during the trial and excepted to at the time by the said defendant; (5) Erroneous instructions given to the jury by the trial judge; (6) Variance between the indictment and the proof introduced at the time of the trial; (7) Misjoinder of parties defendant; (8) Misjoinder of separate and independent offenses; (9) Misconduct of the jury; (10) Separation of the jury after submission of the case to them and before verdict.

## VIII.

The court erred in denying the motion of the defendant Louie Ding in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged in the first count of the indictment, upon the following grounds:

(1) That said verdict was against and contrary to law; (2) That said verdict was against and contrary to the evidence; (3) Insufficiency of the evi-

dence to justify the verdict; (4) Error of law occurring during the trial and excepted to at the time by the said defendant; (5) Erroneous instructions given to the jury by the trial judge; (6) Variance between the indictment and the proof introduced at the time of the trial; (7) Misjoinder of parties defendant; (8) Misjoinder of separate and independent offenses; (9) Misconduct of the jury; (10) Separation of the jury after submission of the case to them and before verdict.

### IX.

The court erred in imposing a sentence upon the defendant Louie Ding to serve a term of two years in the United States penitentiary at McNeil's Island in the State of Washington and pay a fine of five hundred dollars.

WHEREFORE, defendant Louie Ding prays that the judgment of said court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendant from custody and exonerate the sureties on his bail bond.

WALTER S. FULTON and  
W. R. BELL,  
Attorneys for Defendant Louie Ding.

Filed this 8th day of November 1916.

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Clerk of the United States District Court for the  
Western District of Washington, Northern Division.



Indorsed: Assignment of Errors. Filed in the U. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

**ORDER EXTENDING TIME TO FILE TRANSCRIPT OF  
RECORD.**

NOW, upon this 6th day of December 1916, comes on to be heard the motion of the defendant Louie Ding for an order extending the time to file the transcript of the record herein, the said defendant appearing through his counsel, and the United States of America appearing through its counsel and consenting to such order,

It is, therefore, hereby Ordered that the time heretofore allowed in which to file the transcript of the record herein in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended to the 15th day of January 1917.

Done in open court this 6th day of December 1916.

JEREMIAH NETERER,  
Judge.

We censure to the entry of the above order.

CLAY ALLEN and  
WINTER S. MARTIN,  
Attorneys for Plaintiff.

Indorsed: Order Extending Time To File  
Transcript of Record. Filed in the U. S. Dist.

Court, Western Dist. of Washington, Northern Division, Dec. 6, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

**STIPULATION AS TO RECORD.**

It is hereby stipulated between the plaintiff and the defendant Louie Ding, through their respective attorneys, that the following designated papers comprise all of the papers, exhibits and other proceedings which are necessary to the hearing of this cause upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and that none but said papers need be included in the records of said court:

Indictment.

Plea.

Impanelling of jury.

Verdict.

Motion for new trial.

Motion in arrest of judgment.

Order overruling motion for new trial, and motion in arrest of judgment.

Bond.

Opinion of court.

Bill of exceptions.

Petition for writ of error.

Assignment of errors.

Allowance for writ of error.

Writ of error.

Citation on writ of error.

Order extending time for serving and filing bill of exceptions.

Order extending time for filing record.

Stipulation as to record.

Clerk's certificate.

It is also stipulated that the original exhibits herein may be attached to the record by the Clerk and transmitted to the Circuit Court of Appeals and the same need not be printed. In preparing the printed record all captions, except upon Writ of Error, Citation on Writ of Error and Order Allowing Writ of Error, may be omitted.

CLAY ALLEN and WINTER S. MARTIN,  
Attorneys for Plaintiff.

WALTER S. FULTON, and  
WM. R. BELL,

Attorneys for Defendant Louie Ding.

Indorsed: Stipulation as to record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

**CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.**

*United States of America, Western District of Washington—ss.*

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify that the foregoing 89 printed pages numbered from 1 to 89, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 192 folios at 15c .....	\$28.80
Certificate of Clerk to transcript of record, 4 folios at 15c .....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to original Exhibits 3 folios at 15c .....	.45
Seal to said Certificate.....	.20
Statement of cost of printing said transcript of record, collected and paid.....	125.00
Total.....	<u>\$155.25</u>

I hereby certify that the above cost for preparing and certifying record amounting to \$155.25, has been paid to me by Messrs. Wm. R. Bell and Walter S. Fulton, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 9th day of January, 1917.

FRANK L. CROSBY,

(Seal)

Clerk of U. S. District Court.



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

LOUIE DING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 3299

**WRIT OF ERROR.**

United States of America, Ninth Judicial Circuit.—  
ss.

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA:

To the Honorable Judge of the District Court  
of the United States for the Western District of  
Washington, Northern Division:

Because in the record and proceedings, as also  
in the rendition of judgment, of a plea which is in  
the said District Court before you, between the  
United States of America, as plaintiff, and Louie  
Ding, as defendant, a manifest error hath happened,  
to the great damage of the said defendant, as by his  
complaint appears, and we being willing that error,  
if any hath been, should be corrected, and full and  
speedy justice done to the party aforesaid in this  
behalf, do command you, if judgment be therein  
given, that under your seal, you send the record and  
proceedings aforesaid with all things concerning

the same to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at the city of San Francisco, in the state of California, where said court is sitting, within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 8th day of November, 1916.

(Seal)

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washinton, Northern Division.

Allowed this 8th day of November, 1916, after plaintiff in error had filed with the clerk of this court with his petition for a writ of error, his assignment of errors.

JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington, Northern Division.

Copy of within Writ of Error received and acknowledged this 8th day of November, 1916.

CLAY ALLEN,  
WINTER S. MARTIN,

Attorneys for Plaintiff.

Indorsed: No. 3299. In the United States Circuit Court of Appeals for the Ninth Circuit. Louie Ding, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Walter S. Fulton and W. R. Bell, Attorneys for Plaintiff in Error.

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3299

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN B. MILLER, WILLIAM KIRKLAND,  
LOUIE E. LORTIE, HARRY TOY and  
LOUIE DING,

Defendants.

**CITATION ON WRIT OF ERROR.**

TO THE UNITED STATES OF AMERICA:  
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Louie Ding is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington, Northern Division, this 8th day of November 1916.

JEREMIAH NETERER,

(Seal)

Judge.

Copy of within Citation received and due service of the same acknowledged this 8th day of November, 1916.

CLAY ALLEN,  
WINTER S. MARTIN,

Attorneys for Plaintiff.

Indorsed: No. 3299. In the District Court of the United States for the Western District of Washington, Northern Division, United States of America, Plaintiff, vs. Louie Ding, et al., Defendants. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Service of papers in this case may be made upon Walter S. Fulton and W. R. Bell, Attorneys for Defendant Louie Ding. 1112 Hoge Building, Seattle, Wash.



No. 2921

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT <sup>2</sup>

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LOUIE DING,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN  
DIVISION

HON. JEREMIAH NETERER, Judge.

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**Brief of Plaintiff in Error**

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WALTER S. FULTON, and  
WILLIAM R. BELL,

*Attorneys for Plaintiffs in Error*

1112 Hoge Building, Seattle, Wash.

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Filed

MAY 3 - 1917

F. D. Monckton,  
Clerk



No. 2921

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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LOUIE DING,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

---

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN  
DIVISION

HON. JEREMIAH NETERER, Judge.

---

Brief of Plaintiff in Error

---

WALTER S. FULTON, and  
WILLIAM R. BELL,

*Attorneys for Plaintiffs in Error*

1112 Hoge Building, Seattle, Wash.

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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LOUIE DING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

---

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN  
DIVISION

HON. JEREMIAH NETERER, Judge.

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**Brief of Plaintiff in Error**

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**STATEMENT OF THE CASE.**

The plaintiff in error was indicted together with Melvin B. Miller, William Kirkland, Louie E. Lortie, and Harry Toy for conspiring with his codefendants to violate Section 11 of the Act of Congress of May 6th, 1882, as amended and added to by the Act



of July 5, 1884, and the purpose of the conspiracy was alleged to be the bringing into the State of Washington from the province of British Columbia seven alien Chinese persons not lawfully entitled to be or remain in in United States. To the indictment, the defendants Miller, Kirkland and Lortie pleaded guilty, and the defendant Harry Toy and the plaintiff in error pleaded not guilty, and were placed on trial. (Trans. pages 1 to 7.)

At the conclusion of the trial the jury returned a verdict of guilty as charged in count one of the indictment as to the plaintiff in error, with recommendation of extreme leniency, and after a motion for new trial and motion in arrest of judgment had been duly interposed and denied, plaintiff in error was sentenced to serve a term of two years in the Federal Penitentiary at McNeil's Island and to pay a fine of five hundred dollars. From this judgment and sentence this appeal is prosecuted. (Trans. pages 7, 10, 79 to 82.)

At the inception of the case and before a jury was impanelled plaintiff in error demanded a severance of his trial from that of his codefendant, Harry Toy, which motion after argument was denied and an exception allowed. (Trans. pages 60 to 61.) Thereafter and before exercising his peremptory challenges, plaintiff in error through his counsel inquired of the court whether he would be permitted

to have the number of peremptory challenges allowed by law, to-wit, ten, or whether he would be required to divide the number of peremptory challenges with his codefendant. After consideration of the question it was ordered that the two defendants be required to exercise the peremptory challenges together and be allowed only ten such challenges in all. To this action of the court the plaintiff in error excepted and his exception was allowed. (Trans. pages 62 to 66.)

After having exhausted the ten peremptory challenges jointly as required by the order of the court, the plaintiff in error notified the court that he desired to exercise an additional challenge as to another juror then sitting, which application was denied and an exception allowed. (Trans. pages 65 and 66.) The jury was then sworn to try the case, and the attorney for the Government proceeded with his opening statement to the jury in the course of which, he made the following statement and admission:

“The conspiracy in this case was formed first by the three white men going together, into which conspiracy came Ding and Toy. There is no connection between Ding and Toy. They were operating for their own purpose. Ding entered it for his own purpose, and Toy entered it for his. Ding and Toy came into the conspiracy then. The defendant Ding gave Lortie certain letters in Chinese for the purpose of having

Lortie deliver the same letter to another Chinese in the city of Vancouver. The defendant, Harry Toy, did likewise, not in the same presence, and not at the same time, but operating in the same common purpose. He gave a letter for the two Chinese, a letter to his confederate and friend in Vancouver. The white men had two letters. Lortie had the letter from Ding, and Kirkland had the letter from Toy, and with these letters in their pockets they sailed from Seattle, or rather, I should say, they went temporarily to Anacortes, and Lortie joined them at Anacortes; Miller and Kirkland took the boat to Anacortes, and Lortie got on the boat that night at Anacortes, and they all went to Vancouver on the gasoline boat, the 'Maud K.' Arriving in Vancouver they docked the boat, or anchored it near the shore on the outskirts at the gravel pit, near the golf links, on English Bay. I believe there is a car line goes out there from the city. They went into the city, Lortie going to the Chinese he was going to; and Kirkland went to the Chinese at 1902 Pender Street, and that Kirkland, in order to perfect the object of this conspiracy, went to the Chinese on Pender Street, and secured, or made arrangements for the delivery of two Chinese boys, or men, of the excluded class, that is, two Chinese laborers, to enter upon his boat and come down here. And Lortie took his letter up to another place in town and delivered it to one Louie, a Chinese whom he knew, and whom he had had some dealings with before, and pursuant to the delivery of that letter, which I believe contemplated the delivery of eight Chinese boys, only five were delivered. Five Chinese came down in one party, and two came down

in the other. Having placed them on board the boat, Lortie left the party and returned by other means of conveyance to the city of Seattle, coming, I believe, on one of the Canadian Pacific Railroad boats. Miller and Kirkland with the Chinese on board, navigated across from Vancouver to the city of Seattle. They landed here at the foot of Harrison Street in the city of Seattle and Lortie was here in the city waiting to receive them. Lortie received a telephone call from the defendant Kirkland, after he had disposed of the two Chinese to the defendant Toy; and that we will show as was done under the following circumstances \* \* \* After Toy had received the two Chinese and walked off with them, Kirkland went away and went upon First Avenue, and then telephoned his friend Lortie, to send his man down for the five Chinese who still remained, and Lortie then came to the boat and received the five Chinese and piloted them through the city." (Trans. pages 25 to 27.)

As soon as the opening statement had been concluded, the plaintiff in error renewed his motion for a severance of the trial, on the ground that the statement showed two separate and distinct conspiracies, one entered into between the plaintiff in error and the defendant Lortie to bring in a definite number of alien Chinese in violation of law, and the other a conspiracy between the defendant Toy and his codefendant Kirkland to bring in two Chinese aliens in violation of law. This motion, after argument, was denied and an exception al-

lowed. (Trans. pages 27 and 28.) Thereupon the plaintiff in error moved that the action be dismissed and that he be discharged from custody. This motion was based upon the indictment and opening statement of counsel for the Government. The indictment by its terms charged one general conspiracy on the part of all the defendants to violate the immigration laws, while the opening statement of counsel for the Government disclosed that there were two separate and independent felonies, one a conspiracy between the defendant Lortie and the plaintiff in error to import seven alien Chinese into the United States, and the other a conspiracy between the defendant Toy and his codefendant Kirkland to import two alien Chinese into the United States. This motion, after argument, was denied and an exception allowed. (Trans. pages 29 and 30.)

The evidence of the Government tended to establish that about the eighth day of October 1915, the defendant Lortie entered into an arrangement with the plaintiff in error by the terms of which he was to bring from the Port of Vancouver in the Province of British Columbia to the Port of Seattle in the State of Washington, seven alien Chinese and that the plaintiff in error was to pay his codefendant a certain sum for each of the seven Chinese delivered to him at Seattle; that about the same time, but at a different place the defendant Toy entered



into an arrangement with the defendant Kirkland by the terms of which the latter was to bring from the Port of Vancouver in the Province of British Columbia to the Port of Seattle in the State of Washington two Chinese persons and was to receive an agreed compensation therefor; that Toy did not know about the arrangement between Lortie and the plaintiff in error, and the plaintiff in error did not know about the arrangement between Toy and his codefendant Kirkland, and the only connection, if any, between the two plans or alleged conspiracies, a connection which was not known by or disclosed to either of the principals, was that the two employes, Lortie and Kirkland, used the same means of transportation in shipping alien Chinese from the City of Vancouver to the City of Seattle. (Trans. pages 30 to 33.)

In the course of the Government's case in chief an attempt was made to prove that the seven Chinese referred to in the indictment belonged to a prohibited class, that is, were Chinese laborers, but the only proof adduced was that they were Chinese. (Trans. page 56.)

At the conclusion of the Government's case in chief, the plaintiff in error moved the court to direct the jury to return a verdict of not guilty. This motion was based upon two grounds, First that the evidence disclosed two separate conspiracies between

which there was no connection established and, Second that the proof failed to show that the Chinese brought from the Port of Vancouver in the Province of British Columbia to the Port of Seattle in the State of Washington belonged to a prohibited class, and not lawfully entitled to enter the United States. The motion was denied and an exception allowed. (Trans. page 36).

In the course of the defendant's case a witness named William Kirkland who was able to give material evidence in support of the defense tendered by the plaintiff in error was called to the stand, but was rejected as a witness by the trial court, because in the opinion of the court, the witness did not believe in a future state wherein he would be punished for any sins committed in this world. To this ruling of the court the plaintiff in error excepted. (Trans. pages 75 and 76.)

Prior to the rejection of this witness, he was interrogated by counsel for the respective parties and by the court as to his religious beliefs and in answer said that he believed in a Supreme Being who was the Creator of all things, but that punishment for false swearing would come in this life and not in the hereafter. (Trans. pages 66 to 74.)

**ASSIGNMENTS OF ERROR.****I.**

The court erred in overruling the motion of the plaintiff in error for a separate trial, which motion was made immediately after the opening statement by the attorney for the Government and before the introduction of any evidence, this statement disclosing that the facts relied upon by the Government for a conviction would establish two separate and distinct conspiracies, one entered into by the defendants Toy and Kirkland and the other entered into by the defendants Ding and Lortie. Timely exception was taken to the action of the court in overruling the defendant Ding's motion for a severance. (Trans. pages 27-28) Thereupon the plaintiff in error moved the court to dismiss the action and discharge him from custody. This motion also was denied and an exception allowed. (Trans. page 30.)

**II.**

The court erred in overruling the motion of the plaintiff in error for a directed verdict of acquittal made at the close of the evidence introduced by the Government in support of the indictment, which motion was based upon the following several grounds:

a. Improper joinder of two separate and distinct felonies;

b. Insufficiency of the evidence to establish any conspiracy between the defendant Ding and the other defendants.

c. Insufficiency of the evidence to establish that the Chinese alleged to have been transported from the City of Vancouver, B. C. to the City of Seattle, belonged to a prohibited class of aliens;

d. That the alleged conspiracy to import alien Chinese had been consummated and merged into the substantive offense of importing aliens. (Trans. page 36.)

### III.

The court erred in overruling the motion of the plaintiff in error for a directed verdict of acquittal made at the close of the entire case and before it was submitted to the jury which motion was based upon the following grounds:

a. Improper joinder of two separate and distinct felonies;

b. Insufficiency of the evidence to establish any conspiracy between the defendant Ding and the other defendants;

c. Insufficiency of the evidence to establish that the Chinese alleged to have been transported from the city of Vancouver, B. C. to the city of Seattle,

belonged to a prohibited class of aliens;

d. That the alleged conspiracy to import alien Chinese had been consummated and merged into the offense of importing aliens. (Trans. page 36.)

#### IV.

The court erred in requiring the two defendants on trial, Harry Toy and the plaintiff in error to divide between them the number of statutory peremptory challenges, for the reason that there was no connection between the said defendants, and the offenses alleged to have been committed by them were separate and distinct felonies. (Trans. pages 62 to 66.)

#### V.

The court erred in permitting a number of jurors, over the objection of the plaintiff in error, who had sat as trial jurors in the case immediately preceeding the one on trial, in which the United States of America was plaintiff, and the plaintiff in error was one of the defendants, and in which the issues and the evidence were identical with this case, to be impaneled and sworn in this cause. (Trans. pages 75 and 76.)

#### VI.

The court erred in refusing to permit William Kirkland to testify when called as a material wit-



ness on behalf of the plaintiff in error.

When this witness was called to the stand, the following questions were asked and the following answers given:

THE COURT: "Let me ask this question again. Do you believe, or do you disbelieve, in the existence of a God who is the rewarder of truth and the avenger of falsehood, either in this life or in the hereafter. Now, you can answer that directly?

A. Why, I cannot come to believe that a man is rewarded or punished in the hereafter. I believe that there is a Creator and a cause for all of us.

Q. I have told you to answer my question, and you evade it. I asked directly and very pointedly, whether you did believe in the existence of a God who is the rewarder of truth and the avenger of falsehood either in this life or hereafter?

A. Well, I believe a man is rewarded in this life, as I said before.

Q. And you believe he is avenged in this life for falsity?

A. Yes, if he speaks false, it is only a matter of time until he is in trouble. I believe a man can tell the truth just as well without an oath as with it. I know that I can.

Q. (By MR. MARTIN, U. S. District Attorney) You believe that punishment is due to the existence of a Supreme Being acting through your conscience?

A. There is Something, I don't know what It is.

Q. And that Supreme Power, acting through your conscience, leads you to believe that it is better to tell the truth because of the results which may follow?

A. It may follow, yes, I don't know—I don't know what the hereafter is.

THE COURT: We are not asking you about that. I am asking the condition of your mind at the present time as to your belief in a future state?

A. Just as I have told you, as I have already told you, I believe there is a Creator, or a Cause for us existing here, which any reasonable man would know, but what It is, I don't know. I doubt all their religious ways they have of knowing who the Man is.

THE COURT: I don't care anything about that.

A. Or who the Being is, or what it is.

THE COURT: I simply wanted to know if your conscience is affected by the realization and appreciation that there is a Supreme Being that overrules and directs your conscience, and that is

what I want to know. And that your either favorable or unfavorable conduct in this life will be rewarded or avenged hereafter.

A. I don't think that you are rewarded or avenged in the hereafter.

THE COURT: Do you think you are in this life?

A. I believe that a man is. His good acts in this life will show among his fellow men, and he will get along a great deal better, and he is rewarded in other ways. I think if a man is good he will be rewarded with good, and if he is bad he is punished by this rule on this earth."

(Trans. pages 69 to 74.)

## VII.

The court erred in denying the motion of the plaintiff in error for a new trial, which motion was made in due time, after the jury had returned a verdict of guilty as charged in the first count of the indictment, upon the following grounds:

(1) That said verdict was against and contrary to law; (2) That said verdict was against and contrary to the evidence; (3) Insufficiency of the evidence to justify the verdict; (4) Error of law occurring during the trial and excepted to at the time by the plaintiff in error; (5) Erroneous instructions given to the jury by the trial judge; (6) Variance

between the indictment and the proof introduced at the time of the trial; (7) Misjoinder of parties defendant; (8) Misjoinder of separate and independent offenses. (Trans. pages 8-10.)

### VIII.

The court erred in denying the motion of the plaintiff in error in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged in the first count of the indictment, upon the following grounds:

(1) That said verdict was against and contrary to law; (2) That said verdict was against and contrary to the evidence; (3) Insufficiency of the evidence to justify the verdict; (4) Error of law occurring during the trial and excepted to at the time by the said defendant; (5) Erroneous instructions given to the jury by the trial judge; (6) Variance between the indictment and the proof introduced at the time of the trial; (7) Misjoinder of parties defendant; (8) Misjoinder of separate and independent offenses. (Trans. pages 9-10.)

### IX.

The court erred in imposing a sentence upon the plaintiff in error to serve a term of two years in the United States penitentiary at McNeil's Island in the State of Washington and pay a fine of five hundred dollars. (Trans. pages 82 to 86.)

## ARGUMENT

## FIRST.

In this subdivision we will discuss the action of the trial court in denying the application of the plaintiff in error for a separate trial. This motion was made immediately after the opening statement for the Government and before the introduction of any evidence. (Trans. pages 27, 28) This opening statement of counsel for the Government disclosed that while the indictment charged one general conspiracy there were, in fact, two separate, distinct and independent conspiracies, the facts in one conspiracy being different from the facts in the other, and the purpose of each conspiracy being separate and distinct. (Ante pages 3 to 5; Trans. pages 25-27)

It is a general rule that two distinct offenses not provable by the same evidence and in no sense resulting from the same series of acts cannot be joined in the same indictment or tried at the same time. Assuming this premise, the defendants on trial were entitled to a severance since the opening statement of the Government disclosed that there would be proof submitted of two separate and distinct conspiracies, and it was error for the trial court to deny the motion.



In the case of *United States vs. Dietrich*, 126 Fed. 675, it was said at page 677:

“Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end. *Oscanyan vs. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Liverpool, etc. Co. vs. Commissioners*, 113 U. S. 33, 37, 5 Sup. Ct. 352, 28 L. Ed. 899; *Butler vs. National Home*, 144 U. S. 64, 71, 73, 12 Sup. Ct. 581, 36 L. Ed. 346; *Pratt vs. Conway*, 148 Mo. 291, 299, 49 S. W. 1030, 71 Am. St. Rep. 602; *Lindley vs. Atchison, etc. Co.*, 47 Kan. 432, 28 Pac. 201.”

After the denial of the motion for a severance a motion to dismiss the case was interposed by the plaintiff in error for the same reasons advanced in support of the motion for a severance. This motion also was denied and an exception allowed. (Trans. page 30) That the denial of this last motion was erroneous will appear more clearly after a discussion of the refusal of the court to grant a directed

verdict, which discussion will come under the second subdivision herein.

## SECOND

In this subdivision we will discuss the refusal of the court to direct a verdict of acquittal in favor of the plaintiff in error, first interposed at the close of the Government's case in chief and again interposed at the close of the entire case. (Trans. pages 34 to 36) The principal grounds urged in support of the motion for a directed verdict were, First, improper joinder of two separate and distinct felonies, and Second, insufficiency of the evidence to establish that the Chinese alleged to have been transported from the city of Vancouver in the Province of British Columbia to the city of Seattle in the State of Washington belonged to a prohibited class of aliens.

In the opening statement, as hereinbefore pointed out, counsel for the Government admitted there was no connection between the defendants Ding and Toy, that each was operating for his own purpose, and did not know of or participate in the purpose of the other. (Trans. page 25; ante pages 3 to 5). The witnesses for the Government testified that the plaintiff in error and the defendant Lortie had entered into a scheme or arrangement by the terms of which Lortie

was to bring from Vancouver, B. C. to Seattle, Washington seven Chinese and to receive so much per head, and that pursuant to this arrangement, he went to Vancouver by way of Anacortes, secured five Chinese by means of a letter furnished by the plaintiff in error, shipped them to Seattle in a small launch belonging to the defendant Miller, returning himself by another route. About the same time and without the knowledge either of defendant Lortie or the plaintiff in error, the defendant Kirkland entered into a scheme or arrangement with the defendant Toy by the terms of which he was to bring from the city of Vancouver in the Province of British Columbia to the City of Seattle, certain alien Chinese and receive an agreed compensation therefor, that thereupon he proceeded directly from the Port of Seattle to the Port of Vancouver on a small launch operated by the defendant Kirkland, secured the two Chinese agreed upon and brought them from the Port of Vancouver to the Port of Seattle and delivered them to his patron and co-defendant Harry Toy. The only connection between the two alleged conspiracies, if connection it could be called, was the fact that both Kirkland and Lortie shipped their complement of Chinese from Vancouver to Seattle on the same boat, the launch "Maud K", belonging to and operated by the defendant Miller. (Trans. pages 30 to 33.)

A short quotation from the testimony will add force to the foregoing narrative of the facts:

Q. (By MR. BELL, Attorney for plaintiff in error.) "Now, did you ever talk to Mr. Kirkland about Louie Ding in connection with this smuggling proposition?"

A. No sir.

Q. Did Louie Ding know about Kirkland from you?

A. Yes sir, I believe he did. I think we talked about Kirkland.

Q. You think you talked about Kirkland?

A. It seems to me we did.

Q. What was the reason you talked to Louie Ding about Kirkland in connection with this smuggling expedition? Explain that to the jury.

A. Louie Ding explained to me that Kirkland had brought two Chinamen in. He didn't call him by name. He may have, too, but I know he mentioned the one armed Chinaman—(Harry Toy).

Q. What was the reason you talked with Louie Ding about Kirkland in connection with this smuggling expedition? Explain that to the jury.

A. Louie Ding told me that Kirkland would cause me trouble.

Q. Did you and Louie Ding have anything to

do with Kirkland's deal with this other one armed Chinaman that you spoke of?

A. No sir.

Q. That was entirely independent then, of your deal with Louie Ding?

A. Yes, he knew nothing about that as far as I was concerned.

Q. Did you tell Louie Ding about these other Chinamen being brought over by Kirkland for Harry Toy?

A. I told Louie Ding that Kirkland had brought two Chinamen.

Q. That was after you returned, and you told him that Kirkland brought a batch of Chinamen for some one else.

A. Yes sir.

Q. You didn't tell him that before you went to Vancouver?

A. No sir.

Q. He knew nothing whatever about that?

A. No sir." (Testimony of Louie E. Lortie, Trans. pages 30 to 32.)

Q. (By MR. BELL, attorney for plaintiff in error) "Mr. Miller, who was it that first spoke to you, or suggested to you first that you join in on this smuggling expedition? Was it Mr. Lortie?

A. No sir, Mr. Kirkland.



Q. Then it was with Kirkland that you went in on this deal?

A. Yes sir.

Q. And not with Lortie?

A. No sir.

Q. And you hadn't had any talk with Louie Ding about going into this particular expedition, had you?

A. No, I was going after two sets of Chinamen.

Q. You learned that from Lortie?

A. Yes.

Q. And you learned that on the boat?

A. Yes.

Q. And your arrangements were made with Kirkland?

A. Yes, on Mr. Toy's case.

Q. And not with Lortie on the Ding case. That was Lortie's venture, wasn't it?

A. Yes.

Q. And you had nothing to do, and Kirkland had nothing to do with that, had you?

A. Well, we was all together.

Q. You were all together in the same boat, I understand that, but you and Kirkland were in the deal to smuggle Chinamen for Harry Toy, weren't you?

A. Yes sir.

Q. And Lortie was in the deal to smuggle Chinamen for Louie Ding?

A. Yes sir.” (Testimony of Melvin B. Miller, Trans. pages 32 and 33.)

The authorities hold quite generally that where it appears from the indictment that two separate and distinct felonies are charged a demurrer will lie, and if the indictment by its terms charges a joint offense, such as a general conspiracy, but the evidence discloses two distinct and independent offenses, the court, on motion, should direct a verdict of acquittal as to each defendant jointly charged. The leading case upon this subject is *McElroy vs. U. S.* 164 U. S. 76. In that case two indictments, one against several defendants for assault with intent to kill and another against some of them for arson committed on the same day were consolidated and the court held that it was improper to try the defendants jointly on these indictments, even though the record did not show that the defendants were in any way prejudiced or embarrassed in their defense. In the opinion it is said at page 79:

“On the face of the indictments there is no connection between the acts charged as committed April 16 and the arson alleged to have been committed two weeks later, on which last occasion the Government’s testimony, according to the record, showed that the two defendants Charles Hook and Thomas Stufflebeam were

not present. The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.

“The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction. *Young vs. The King*, 3 T. R. 98, 106; *Reg. vs. Heywood*, Leight & Cave C. C. 451; *Tindal, C. J.*; *O’Connell vs. Reg.*, 11 Cl. & Fin. 241; *Reg. vs. Ward*, 10 Cox C. C. 42; *Rex vs. Young*, Russ & Ry., 280; *Reg. vs. Lonsdale*, 4 Fost. & Fin. 56; *Goodhue vs. People*, 94 Illinois, 37; *State vs. Nelson*, 8 N. H. 163; *People vs. Aiken*, 66 Michigan. 460; *Williams vs. State*, 77 Alabama, 53; *State vs. Hutchings*, 24 S. C. 142; *State vs. McNeill*, 93 N. C. 552; *State vs. Daubert*, 42 Missouri, 242; 1 Bish. Cr.

Proc. Sec. 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is devisable on error.

“It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.

“Under the third clause relating to several charges ‘for two or more acts or transactions of the same class of crimes or offenses,’ it is only when they ‘may be properly joined’ that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder of two or more offenses in one indictment against the same person ‘is consistent with the settled principles of criminal law,’ as stated in *Pointer’s case*.

“It is admitted by the Government that the judgments against Stuffebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment,

may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

In *Elliott vs. State*, 26 Alabama, 78, it was held that where an indictment upon its face charges several defendants with several offences, committed by them independently of each other some of which were committed by some of the defendants at one time and some by others of the defendants at a different time is fatally defective, and that though an indictment be unobjectionable on its face, no conviction can be had upon proof of facts which if stated in the indictment would make it fatally defective and enable the defendants after conviction to arrest or reverse the judgment. In the opinion it is said:

"The general rule as to the joinder of defendants, as laid down in works of good authority, is, that where the same evidence, as to the act which constitutes the crime, applies to two or more, they may be jointly indicted. If the offense arise out of the same act, though the parties stand in different relations, they may be



joined. If several be engaged in the commission of the same offences, though each may act a different part in the commission of that offense, they may be joined \* \* \*

“We are, therefore, clear in the opinion that an indictment would be fatally defective, if upon its face it charged several defendants for several offenses committed by them independently of each other, some of which were committed by some of the defendants at one time, and some of which were committed by others of the defendants at a different time.

“Where these facts do not appear upon the face of the indictment, but do appear upon the trial from the evidence, the defendants are as much entitled to the benefit and protection of the rules of law above laid down, as if the indictment had fairly stated the facts, and thus given them an opportunity to demur to it, or to move in arrest of judgment. The mere form in which an indictment may be drawn by the prosecuting attorney, ought never to be allowed to evade or destroy any substantial legal right of the defendant. However unobjectionable on its face, an indictment may be, a conviction under it cannot lawfully result from proof of the identical facts which would, if distinctly stated in it, vitiate the indictment, and enable the defendants, even after conviction, to arrest or reverse any judgment rendered on it against them.”

In the case of *McGehee vs. State*, 58 Alabama 360, it was held that if an indictment charges that two defendants committed one and the same offense at the same time, they cannot be convicted on

proof showing that each committed the offence charged at different times, and when this is developed by evidence on the trial, each defendant has been placed in legal jeopardy on the charge laid in the indictment and is entitled to a verdict of acquittal of that offence. In the opinion it is said:

“If it had been averred in this indictment that the two defendants had committed separate and distinct offences, at different times,—neither being present or participating in the offence of the other—a demurrer to the indictment would have lain, notwithstanding the two offences charged are identical in character. This on the well defined ground, that on such trial, it would be necessary to offer proof of two independent transactions; thus producing inextricable confusion of the minds of the jurors.

“On like principles, if two offenders be charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants committed their several offenses at different times or places—in other words, that they are not guilty of one and the same offense—the proof does not sustain the indictment. Only those persons who participate in the same offense should be joined in one indictment.

“In the present case, according to the recitals in the bill of exceptions, each defendant was equally guilty, but they did not participate in one and the same offence. This was not shown until the evidence was given to the jury. At that state of the trial, each defendant was placed in legal jeopardy, and was entitled to

have a verdict of the jury on the question of his guilt in the absence of some statutory or legal ground, authorizing a *nolle prosequi* or other withdrawal from the jury, that another indictment might be preferred, or continuance granted.

“There being no statute authorizing the entry of a *nolle prosequi* to cure the defect which was developed on this trial, the Circuit Court erred in its allowance. This ruling is decisive of the present prosecution. The defendants having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, must be allowed the benefit of the verdict they were entitled to, and cannot be again tried for the same offence.”

In the case of *Lindsey vs. State*, 48 Alabama 169, the defendants were jointly indicted for gambling and jointly tried. In the evidence it appeared that two of the defendants played together at a public place, and that the other defendant played with persons not indicted at the same time and place, the two games being separate and distinct, and it was held that the three defendants could not be jointly charged and jointly tried. In the opinion of the court, it was said:

“The charge made in the indictment is a single offence. The defendants are alleged all to have played ‘at a game of cards.’ They all participated in the same act which was forbidden by law. This is the purport of the indictment; and it follows the language of the statute.

A public offence is an act forbidden by law, and punishable as prescribed by the code or by the statutes. An indictment is an accusation in writing, presented by the grand jury of the county, charging the person with an indictable offence. All the persons charged must participate in the same act denounced as an offence, to render them guilty; and the guilt must be proved as charged. Here there was but one act charged,—but one playing. Yet the proof showed two acts,—two playings. These were each the subject of an indictment. And the evidence which would establish the one act could not establish the other. It would necessarily be variant. And although not objected to on this account, as it might have been, its legal force could not be extended by the charge of the court, beyond its legitimate effect. This, however, is the effect of the second charge above quoted. This charge was improper. There should have been two indictments, as there were two distinct offences, in which the same persons did not participate.”

In the case of *State vs. Hall*, (N. C.) 1 S. E. 683, the Mayor and aldermen of the city were jointly indicted for failure to perform certain duties imposed by the terms of the city charter, and it was held that in as much as the duties of the Mayor were distinct from those of the aldermen, a joint indictment would not lie. In the opinion, it was said:

“But, moreover, the indictment insufficiently charges two distinct offences against two distinct boards of officers sustaining distinct relations to the city of Wilmington. This is

wholly unwarranted by principle or precedent. Different parties cannot be charged with different and distinct offences in the same indictment. Such a practice would be impracticable, and lead directly to injustice and confusion."

In the case of *Townsend vs. State*, (Ala.) 34 So. 382, the defendants were jointly charged with and convicted of gambling in a public place. All of the defendants were engaged in playing at the same time and place, but because two games were played in one of which some of the defendants played, and in the other the remaining defendants, it was held that they could not be jointly tried and jointly convicted. From the opinion of the court, we quote the following:

"The affidavit upon which this defendant was tried and convicted charged that he and nine other persons therein named played at a game with cards or dice, or some device or substitute for cards or dice, in a highway or some other public place. The evidence undisputedly showed that two of the persons named did not play in the same game with this defendant, but played in another game at the same place, and at the same time. This fact clearly brings the case within the principle that was allowed to control in *Elliott vs. The State*, 26 Ala. 78, and *McGehee vs. The State*, 58 Ala. 360. This defendant and those playing in the game with him should have been proceeded against separately and apart from the others who played in a different game, or the prosecution should have been against each separately."



In a leading English case, *O'Connell vs. Rex*, 11 Clark & Finnelly 241, the defendants were jointly indicted for conspiracy. In the evidence it appeared that instead of one conspiracy, there were in fact, as in the present case, two separate conspiracies, similar in many respects, but each independent of the other, and the court held that it was improper, confusing and prejudicial to try all of the conspirators jointly. From the opinion we briefly quote as follows, at page 236:

“Upon the second question (of the House of Lords), we all agree in opinion that the findings of the jury upon the first, second, third, and fourth counts of the indictment, are not supportable in law. With respect to the first and second counts,—upon the ground that the jury not only find the eight defendants to be guilty of a joint conspiracy charged in each of these counts, but also find a certain number of those eight defendants to have been guilty of separate and distinct conspiracies under the same counts. With respect to the third count,—because they find three of the defendants guilty of a conspiracy to effect all the objects stated; the rest of the defendants, except Thomas Tierney, guilty of a conspiracy to effect part only; and Thomas Tierney a still smaller part of the objects mentioned in the third count. And a similar objection, in point of principle, applies to the findings upon the fourth count, on which all are found guilty of the whole of the charge, except Mr. Tierney, who is found guilty of part only. And the reason and ground for such opinion is this: That as each count of the indict-

ment charges one conspiracy or unlawful agreement, and no more than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies, on a count which charges only one."

To the same effect, see:

*Thomas vs. State* (Ala.) 20 So. 617;

*Cox vs. State*, 76 Alabama 69;

*People vs. Aiken* (Mich) 33 N. W. 825;

*U. S. vs. Dietrich*, 126 Fed. 664.

It was wrong in the first instance to join the defendants Ding and Lortie in the same indictment with the defendants Toy and Kirkland, but, in as much as the indictment charged all of the defendants with participation in the same criminal conspiracy, it was impossible to raise the objection by demurrer. When, however, it was admitted by counsel for the Government in his opening statement that there was no connection between the two groups of defendants, or between the schemes in which they were engaged, the motion to dismiss should have

been granted. The opening statement of counsel for the Government having been supplemented by the evidence of the witnesses, which evidence established beyond all question that both the parties and the offences were separate and distinct a motion for a directed verdict of acquittal interposed first at the close of the Government's case in chief and again at the close of the entire case should have been granted.

*No Evidence that Chinese Brought in Were of a Prohibited Class of Aliens.*

For another reason, the motion for a directed verdict should have been granted. In the indictment, it was charged that the purpose of the conspiracy formed by the defendants was to bring into the United States, a certain number of persons belonging to a prohibited class, i. e., alien Chinese laborers. This was an essential allegation in the indictment, and it was equally essential that proof should be introduced in support of it. An attempt was made on the part of the Government to support this allegation by evidence, but the attempt signally failed. The first witness for the Government interrogated upon this point was Louie E. Lortie, who testified as follows:

Q. (My MR. MARTIN, Asst. Dist. Atty.) "Do

you know who these Chinese people were, or what their business was?

A. No, not their particular business. I know they were coming over here to America.

Q. Were they the laboring class of Chinese, do you know?

A. Well, I could not say.

Q. You knew they were coming to the United States?

A. Yes. Some of them seemed to be pretty intelligent, and others were not." (Trans. pages 43-44)

The next witness and the only other witness who testified upon this point on behalf of the Government was the defendant Melvin B. Miller, who testified as follows:

Q. "What kind of persons were these who were put on board?

A. Chinamen.

Q. What kind of Chinamen?

A. What kind of Chinamen?

Q. Yes.

A. Just ordinary Chinamen, as near as I know. Chinese.

Q. Do you know whether they were Chinese laborers or not?

MR. BELL (Attorney for plaintiff in error):

We object to that as suggestive and leading.

A. I suppose they were.

THE COURT: It is leading. Just state what was said.

A. I supposed they were laboring Chinamen. They looked like.

MR. BELL: I move that be stricken. He says he supposed.

THE COURT: Let the answer be stricken as to what he supposes." (Trans. page 16).

This is all of the testimony introduced by the Government to establish the kind or character of the aliens alleged to have been unlawfully imported, and it was clearly insufficient to support the allegations of the indictment. For this reason alone the trial court should have granted the motion of the plaintiff in error for a directed verdict and its refusal to do so was erroneous.

### THIRD

In this subdivision, we will discuss assignments of error four and five.

Prior to entering upon the examination of the jurors, the plaintiff in error insisted that he was entitled to exercise ten peremptory challenges and should not be required to divide the number of the peremptory challenges allowed by statute with his



codefendant, Harry Toy. The court however, ruled otherwise and compelled the two defendants to exercise jointly the ten peremptory challenges allowed by law, which in effect gave to each of the defendants five peremptory challenges. To this ruling the plaintiff in error excepted and his exception was allowed. (Trans. 60 to 66.)

The rule is well established in the Federal courts that where a number of indictments against the same defendant charging similar offenses are tried together by the same jury, the defendant is entitled to the statutory number of peremptory challenges to each indictment. In the case of *Betts vs. United States*, 132 Fed. 228, there were nine indictments returned against the defendant, each indictment containing three counts. These indictments were consolidated for trial and in the course of the trial the question arose as to whether the defendant was entitled to three peremptory challenges in all or three peremptory challenges to each of the indictments, and the court held that he was entitled to twenty-seven peremptory challenges for the reason that if the defendant had been tried separately on each indictment he would have been entitled to that number. In the course of the opinion, the court uses the following language, at page 234:

“The only other error assigned which requires consideration is with reference to the

number of challenges to which Betts was entitled. It is first necessary to consider further the nature of the proceeding involved in the order of the court that the indictments should be 'tried together and at the same time.' We have said that under the circumstances this was not a consolidation in the proper sense of the word. The natural meaning and inherent force of the word 'consolidation' are perfectly plain and irresistible, although it is known that in some of the authorities the word is used loosely. It has its place in proceedings in equity, or in admiralty, where several libels or petitions are, by authority of the court, combined into one, so that at the close only one decree is rendered. An example of this in admiralty is found in *The North Star*, 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. Ed. 91, where unification by consolidation proper was clearly expressed. Beyond all question, no such consolidation could arise with reference to the present indictments, because otherwise the implied prohibition of the statute on which they were based against combining in one indictment more than three offenses would be indirectly defeated. The result is that, as neither indictment lost its identity, the material rights of both parties as to each continued the same, unless so far as otherwise necessarily involved in the trial of all at the same time with the same jury, or unless so far as expressly provided by statute or necessarily implied from what the statute enacts. Accordingly, in *Mutual Life Co. vs. Hillmon*, 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706, in speaking of the statutes we are discussing, it naturally fell into the use of the following language: 'No defendant could

be deprived (meaning none could be deprived by an order for trying cases together), without its consent, of any right material to its defense, whether by way of challenge of jurors,' etc. It is true that this broad language was not strictly essential to the case in which it was used, but the way in which the court fell into it illustrates strikingly that it is the natural construction to be given to the statutes in question. Therefore it rests on the United States to make it clear that this natural reading should not have full effect. With such reading the conclusion follows that, inasmuch as by the express language of section 819 of the Revised Statutes (U. S. Comp. St. 1901, p. 629) the plaintiff in error had a right to three peremptory challenges on each indictment if tried separately, this was a 'right material' to his defense, not to be taken away merely because several indictments were submitted to the same jury at the same time. Not only is there no provision of the statute to the contrary, but there is nothing in the practical conditions of a joint trial which would justify the court in holding that the statute by implication necessarily deprived the plaintiff in error of the right claimed by him."

In the case of *Mutual Life Insurance Co. vs. Hillmon*, 145 U. S. 285, 293, a similar rule is announced as follows:

"But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived without its consent, of any right material

to its defence, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately. Section 819 of the Revised Statutes provides that in all civil cases 'each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.' Under this provision, defendants sued together upon one cause of action would be entitled to only three peremptory challenges in all. But defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right of challenge, secured to the defendants by the statute, entitles them to a new trial."

See also, *Krause vs. U. S.* 147 Fed. 44, 46.

It was especially important to the plaintiff in error to be allowed to exercise the full number of peremptory challenges allowed by statute. Immediately prior to the calling of the present case for trial, the plaintiff in error together with certain other defendants had been tried and found guilty of conspiring to bring into the United States alien Chinese of a prohibited class. The jury which heard the evidence in that case and which returned a verdict of guilty was drawn from the same panel as the jurors in the present case, and, indeed, most of the

jurors called from the panel in the present case had served as jurors in the prior one. After the plaintiff in error had exercised the five peremptory challenges allowed to him by virtue of the order of the court, he was desirous of exercising other and additional challenges for the reason that there remained upon the jury a number of jurors who had served in the preceeding case, and who upon similar testimony had found the defendant guilty as charged, and this fact was brought to the attention of the court at the time that the plaintiff in error, through his counsel, insisted upon his right to exercise the ten peremptory challenges allowed by statute independently of his codefendant. These jurors who had sat in the preceeding case were disqualified for that reason alone from sitting as jurors.

In the case of *Sessions vs. State*, (Tex.) 38 S. W. 605, it was held that jurors are disqualified to try a person having tried a case involving the same transactions against a codefendant, though they state that they have not formed an opinion as to his guilt or innocence, and could try the case impartially. In the opinion, it was said,

“Appellant, on the impanelment of the jury in this case, challenged five of the panel furnished him, on the ground that they had tried a case against Virgil Adkins, charged with theft of the same horse, and had found him guilty. The court overruled his challenge, and com-



pelled him to pass on the jurors. He challenged two of them peremptorily, but three sat upon the jury. The bill of exceptions shows that these jurors stated that, notwithstanding they had tried a case involving the same transaction against a codefendant of appellant, they had not formed an opinion as to the guilt or innocence of the defendant, and could try him impartially. It is also shown that appellant exhausted his challenges. It has been held by this court that jurors, under such circumstances, are disqualified."

In the case of *Obenchain vs. State*, (Tex.) 34 S. W. 278, it was held that jurors who tried a person for playing at a game of cards in a public place and rendered a verdict of guilty were incompetent to sit upon a subsequent trial of another person for playing with the former at the same game, where the evidence on the second trial was substantially the same as that on the first. In the opinion in that case it was said:

"It will be observed, from the foregoing, where the juror states he has formed an opinion, and that it will influence his verdict, he is to be discharged. If, however, he answer that he has formed an opinion, but that such opinion will not influence his verdict, he shall be further examined, as to how his conclusion was formed, etc. Said statute further expresses the idea that, if the opinion in question was formed from mere hearsay, and the juror then states, on oath, that he can, with such an opinion, render an impartial verdict upon the law and the evidence,

the court may, in its discretion, admit him as competent to serve in such case. This would appear to negative the proposition that, if the juror had reached his conclusion from having received his information from the witnesses in the case, or from having heard the evidence developed on the trial of the case, it was the intention of the legislature to exclude him as an incompetent juror; and, with a stronger reason, it occurs to us, that, if he has formed his conclusion in the case in the most solemn manner authorized by law,—that is, having, as a juror, under his oath, heard the testimony and rendered a verdict upon the same evidence,—he would be disqualified. We apprehend that it would hardly be contended that, if the appellant in this case had had a former trial before these same jurors, and had been convicted, and for some cause a new trial awarded him, they would be considered competent jurors on a subsequent trial of the case; and the court would scarcely permit that they should even go through the form of an examination to ascertain whether or not the opinion formed on the previous trial would influence them in finding a verdict. No such self-stultification on the part of the jurors would be allowed. See *Shannon vs. State* (Tex. Cr. App.) 28 S. W. 540; *Suit vs. State*, 30 Tex. Cr. App. 319, 17 S. W. 458. In this case, the jurors in question, as before stated, sat in a case which involved the identical transaction for which the defendant was tried. They received the evidence in that case in the most solemn form, and rendered a verdict. They had thus formed and expressed an opinion on the same facts upon which the appellant was to be tried, and we can scarcely conceive how it was pos-

sible for them to lay aside their already formed opinions, so as to constitute themselves fair and impartial jurors. Some men may be competent to do this, but they must constitute a very inconsiderable portion of those from whom the jury lists are drawn to try cases. In our opinion, the precedent would be a dangerous one, and, besides, it would appear to be an innovation upon the very meaning of the statute itself. The court below should have set aside these jurors as incompetent to try this case."

Other cases announcing the same rule are as follows:

*Shannon vs. State* (Tex.) 20 S. W. 540;

*People vs. Maull*, 100 N. W. 913 (Mich.)

*Curtis vs. State* (Ala.) 24 So. 111;

*Stevens vs. State*, 53 N. J. L. 245; 21 Atl. 1038;

*Gorthwaite vs. Tatum*, 21 Ark. 336; 76 Am. Dec. 402;

*Railway Co. vs. Smith*, 60 Ark. 221.

Whatever difference of opinion there might be as to the right to challenge these jurors for cause and to have such challenge sustained, there can be no question, from the standpoint of the plaintiff in error, as to the undesirability of having jurors who had found him guilty of a similar charge upon similar evidence sit as jurors in the present case. Consequently when the court limited his number of peremptory challenges to one-half of those allowed by statute, plaintiff in error was denied a right material to his defense.

## FOURTH

In this subdivision, we will discuss briefly the action of the trial judge in refusing to permit the witness William Kirkland to testify when called as a material witness on behalf of the plaintiff in error. Upon a suggestion that this witness entertained some peculiar views as to religion and the hereafter, he was examined at considerable length by counsel for the respective parties and by the court. (Trans. 66 to 76.) After this interrogation had been concluded, the court held that he could not be sworn as a witness, (Trans. 16) and denied the plaintiff in error the right to submit his testimony to the jury upon questions material to the issue.

The proposed witness stated, as appears from his testimony quoted in the assignments of error herein, that he believed in a Supreme Being but was of the opinion that persons guilty of perjury received their punishment through the operation of their conscience in this world and not in the hereafter. The court, however, adhered to the ancient common law doctrine and held that a person who did not believe that he would receive punishment in the hereafter was not qualified to be sworn as a witness. (Trans. page 16) This was prejudicial to the plaintiff in error.

In 40 Cyc. page 2202, the general rule on this subject is succinctly stated as follows:

“The original common-law rule is that a person must, in order to be a competent witness believe in God, and in a state of future reward or punishment; but this has been modified so as to let in the testimony of persons who believe in the existence of a Supreme Being, although not in rewards and punishment after death, and in a number of jurisdictions the common-law rule is entirely abrogated by constitutional or statutory provisions under which religious belief or the lack of it has no bearing whatever on the competency of the witness.”

In the State of Washington, this is settled by a constitutional enactment,

“No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.” (Const. Art. 1, Sec. 11 and 4th Amend. thereto).

The rule is quite general that one who believes in the existence of a Supreme Being and that God will punish in this world for every sin committed, though he does not believe that punishment will be inflicted in the world to come, is a competent witness.

*Shaw vs. Moore*, 49 N. C. 25;

*Blocker vs. Burgess*, 2 Ala. 354;



*United States vs. Kennedy*, 26 Fed. Cas. No. 15524; 3 McLean 175;

*Blair vs. Seaver*, 26 Penn. St. 224;

*Shaw vs. Moore*, 49 N. C. 26.

From the case first cited we quote the following:

“The case presents this question: Is a person who ‘believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in *this world*, all violators of his law, and that the sinner will inevitably be punished *in this world* for each and every sin committed; but there will be no punishment *after death*, and that in another world all will be happy and equal to the angels’—a competent witness?

“The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. In reference to the first, no question is made; but it is insisted, that the religious sanction required, is the fear of punishment in a *future* state of existence.

“This position is not sustained by the reason of the thing, for, if we divest ourselves of the prejudice growing out of preconceived opinions as to what we suppose to be the true teaching of the Bible, it is clear that, in reference to a religious sanction, there is no ground for making a distinction between the fear of punishment by the Supreme Being in this world, and

the fear of punishment in the world to come; both are based upon the sense of religion. If, on the one hand, it be said, that there is, in the fear of punishment in a future state of existence, an awful, undefined dread, and on the other, that from the constitution of our nature, we fear more that punishment which is near at hand, than that which is distant, the reply is, this is matter of speculation merely, and has no bearing upon the question, because the efficacy of the fear of punishment in either case, depends upon the degree of the belief as to the certainty of that punishment; so that, there can be, upon reason, no ground for making a distinction. The rule of law which requires a religious sanction, is satisfied in either case.

“It is true, that in the old cases it is held to be the common law, that no infidel, (in which class Jews were included,) could be sworn as a witness in the courts of England, which was a *Christian* country; and *Lord Coke* gives this as his opinion, in which he says all the cases agree, and he assigns as the reason on which the law is based, ‘All infidels are in law *perpetui inimici*; for, between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility.’ This reason to say the least of it, is narrow-minded, illiberal, bigotted and unsound.

\* \* \* \*

“Afterwards, in the case of *Omychund vs. Barker*, 1 Atk., 19 and Willes, 538, it was decided by the Lord Chancellor, with the assistance of Chief Baron Parker, Chief Justice Willes and Chief Justice Lee, that a Gentoo, who was an infidel, who did not believe in either the

Old or New Testament, but 'who believed in a God, as the Creator of the Universe, and that he is a *rewarder of those who do well, and an avenger of those who do ill,*' is, according to the common law, a competent witness, and may be sworn in that form which is the most sacred and obligatory upon his religious sense.

\* \* \* \*

"The great case of *Omychund vs. Barker*, (it may well be called 'great,' for it relieved the common law from an error that was a reproach to it,) establishes the rule to be, that an infidel is a competent witness, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. The substance of the thing is, every oath must have a religious sanction. Such being the common law in regard to infidels, it follows, *a fortiori*, that the same rule is applicable to a witness, who is a *Christian*; and the fact, that this Christian believes that the divine punishment will be inflicted in this world, and not in the world to come is immaterial, and in no wise affects the principle of the rule. It is a mere 'difference of opinion,' as to the true teaching of the Gospel. This we find is the conclusion of the courts in most, if not all, of the states of the Union where the question has been presented for adjudication. 15 Mass., 177; 2 Cush., 104; 18 John., 98; 5 Mason, 18; 2 Ala., 354; S. C. Law Journal, 202; 13 Vt. 362." (Italics, the Court's).

In the second case cited, the court discusses the same question as follows:

"The learned and elaborate opinion of Chief

Justice Willes, in the case of *Omichund vs. Barker*, Willes' Rep. 538 is the text generally resorted to on this interesting subject. The question in that case was, whether an East Indian, professing the Gentoo religion, who had given evidence on a commission issuing out of Chancery, who had been sworn according to the custom of his religion, was a competent witness.

“The learned Judge proceeds to show, that the substance of an oath had nothing to do with Christianity—that oaths were more ancient than the Christian religion, and successfully combats the notion of Lord Coke, that an infidel could not be a witness. He expressly lays down the doctrine, ‘that an infidel, who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state may be examined on his oath.’

“In the case of *Butts vs. Swartwout*, 2 Cow. 431, a witness professing the same religious belief as the witness in this case appears to entertain, was held to be a competent witness. Indeed, if we consider the source of the obligation of an oath, it appears strange that the question should be raised in this enlightened age of the world. An oath is a solemn adjuration to God, to punish the affiant if he swears falsely. The sanction of the oath is a belief, that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief, that God is the aven-

ger of falsehood; see, also, (*Hunscom vs. Hunscom*), 15 Mass. 184."

In the case of *United States vs. Kennedy*, (supra) Fed. Cas. No. 15,524, the court in discussing the same question, uses the following pertinent language:

"However highly the witness may appreciate character, and however strongly he may detest the crime of perjury, from the infamy attached to it, still the law requires a higher obligation to operate upon the conscience of the witness. He must believe in a Superintending Providence, who punishes crime. This presupposes a belief in a future state. The authorities are divided on the point whether, if the rewards and punishments, according to the belief of the witness, are to be inflicted in this life, he is competent. *Com. vs. Bachelier*, 4 Am. Jur. 81. In *Hunscom vs. Hunscom*, 15 Mass. 184, the court held that mere disbelief in a future existence went only to the credibility. Contra, *Atwood vs. Welton*, 7 Conn. 66. In the case of *Omichund vs. Barker*, Willes, 1 Atk. 21, where the subject was largely discussed, it was held, that the belief of a God, and that he will reward and punish us according to our deserts, is essential; but whether the rewards and punishments are limited to this life, or the next, is not material. At least this view is sustained by the weight of authority. The individual who believes that a bad act will be punished in this life, and a good one rewarded, by God, cannot be said to act free from that moral influence of hope and fear which the law contemplates as



the best security against punishment. This influence will operate more strongly, when referred to the future than the present life. And it would seem, as stated in some of the authorities, that a disbelief in a state of future rewards and punishments should go to the credibility of the witness, and not to his competency. 1 Greenl. Ev. Secs. 368-370."

## FIFTH

In this subdivision will be included assignments of error, seven, eight, and nine. These assignments involve the erroneous action of the trial court in denying the motion of the plaintiff in error for a new trial and his motion in arrest of judgment, and in sentencing him to serve a term of two years in the United States penitentiary at McNeil's Island, and pay a fine of five hundred dollars.

The discussion under the previous subdivisions completely covers these assignments of error and nothing further need be added. If the contention of the plaintiff in error as to those assignments of error is correct, then it was the duty of the trial court to grant the motion of the plaintiff in error in arrest of judgment, and its failure to do so was erroneous.

For the reasons hereinbefore given, we respectfully submit that the judgment in this case should be reversed with instructions to the lower court to dismiss the action and discharge the plaintiff in error from custody and exonerate his bond.

Respectfully submitted,

WALTER S. FULTON, and  
WM. R. BELL,

Attorneys for Plaintiff in Error.



No. 2921.

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IN THE  
**United States Circuit Court**  
**of Appeals**  
**For the Ninth Circuit**

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LOUIE DING

*Plaintiff in Error,*

*vs.*

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN  
DIVISION.

---

HON. JEREMIAH NETERER, *Judge.*

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**Brief of Defendant in Error**

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310 Federal Building,  
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**Brief of Defendant in Error**

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FIRST AND SECOND.

For purposes of discussion counsel's first and second subdivisional topic may be argued together.

We have no criticism to offer against the case of *United States vs. Dietrich*, 126 Fed. 675, cited by counsel, to the legal effect of an admission in the opening statement, but deny its force or ap-

plication in the instant case.

Counsel argues that, because the statement was made in Government's opening, that there was no connection between the defendants Ding and Toy, two conspiracies were described and admitted. Examine this opening statement carefully and you will find but one conspiracy spoken of throughout the entire narrative of the case. The white men who did the actual smuggling formed a conspiracy to bring in Chinese. Louie Ding came into the conspiracy for his own gain without regard to Toy. And Toy did the same with reference to Ding. Each knew he was entering a conspiracy to bring in Chinese.

It is well settled law that men may become members of a conspiracy and never meet each other. They may have joined it in its early stages or they may have come into the conspiracy as it was nearing completion. It is sufficient if two or more remained in it or were in it when the overt act was committed.

Any party coming into a conspiracy at any stage of the proceedings, with knowledge, is regarded as a party to all acts done by any of the

other parties, before or afterwards, in furtherance of the common design.

*U. S. vs. Cassidy*, 67 Fed. 698,

*U. S. vs. Sacia*, 2 Fed. 754, 578,

*U. S. vs. Babcock*, Fed. Cas. No. 14487, (3 Dill. 586),

*Sherman vs. U. S.*, 156 Fed. 897, 912.

In view of what happened in the case it is difficult to see how the defendant was injured even admitting for argument's sake that separate conspiracies existed. The evidence at the opening of the government's case was limited to what was done between Lortie and Ding in making the preliminary arrangements in Seattle for the incoming Chinese, and to the transportation of five Chinese from Vancouver to Seattle. As to what was said between Toy and Kirkland concerning Toy's Chinese and what arrangements were made between Kirkland and Toy, and what Kirkland did in respect to the Chinese, the court's ruling in the Government's case in chief that Kirkland was not a competent witness effectually closed the door against all of this testimony. Toy's part in the case was a closed

incident early in the government's case.

The government's case thus narrowed down to evidence which showed that Kirkland brought two Chinese on board the launch at Vancouver. Lortie and Miller testified to this but beyond the statement that Kirkland brought them to the boat nothing appeared in the case touching Toy or a second conspiracy. Ding's case went to the jury on Lortie's statement with that of Miller, and other corroborating circumstances, to the effect that Ding intended that Lortie should bring eight but that they, Lortie and Miller, could and did secure only five Chinese in Vancouver to bring into the United States. Insofar as Ding was concerned it was a simple case of conspiracy between him and the whites to bring Chinese into this country in violation of law.

At the close of the government's case in chief, Toy was dismissed out of it upon ground that there was no evidence in the government's case to connect him with the conspiracy charged in the indictment, and Ding was left in the case as the sole defendant on trial, for Ding's white associates had pleaded

guilty. Ding was thus unhampered in making his defense. He had nothing to meet except the evidence involving him. Toy was never in the case after the opening statement and what Toy and Kirkland did or did not do never got before the court.

We do not, however, concede for a moment that the indictment is duplicituous in charging more than one crime nor that the opening statement suggested two conspiracies, nor do we concede that the proof disclosed two conspiracies. We should have argued had Kirkland stayed in the case as a witness that there was one general conspiracy to bring in Chinese similar to that of the case of *Dahl vs. United States*, decided by this court in 234 Fed. 618. We should have argued further that the testimony disclosed a general smuggling expedition to Vancouver and return, wherein Louis Ding furnished the Chinese letters of direction to the white men to bring in seven or eight Chinese and Toy furnished the directions for bringing in two; that it was a conspiracy into which came Ding at one time and Toy at another. The



opening statement showed this. The case simply broke down as to one defendant.

But the court's action took Kirkland as a witness and Toy as a defendant out of the case. Thus emasculated the case made out by the Government charged Ding alone with conspiring with others who had pleaded guilty to bringing Chinese from Vancouver to Seattle. The proof disclosed but one conspiracy.

“NO EVIDENCE THAT CHINESE BROUGHT  
IN WERE OF A PROHIBITED  
CLASS OF ALIENS.”

The record in this case discloses an agreement between Lortie and Ding, entered into early in October, 1915, whereby Lortie was to go to Vancouver in his launch with his white associates, and return with such Chinese as he could procure from Louie Ding's co-workers and co-conspirators in Vancouver. Lortie was told by Ding he would be able to secure eight Chinese in Vancouver to be smuggled into this country. In fact, upon arrival in Vancouver, after presenting his Chinese letters, he was able to secure only five Chinese, and these

were brought to the United States on the launch by Miller and Kirkland.

In counsels' brief there is brief mention of the direct testimony bearing on the prohibited alien character of the Chinese who were actually brought in on the return trip from Vancouver to Seattle.

Counsel would narrow the proof down to the one statement, viz:

“Q. Were they the laboring class of Chinese, do you know?”

A. Well I could not say.”

(P. 35 Brief of Plaintiff in Error).

In addition to the direct question which was of no avail as indicated by the answer, there is an overwhelming amount of circumstantial evidence which shows conclusively that the Chinese belonged to the prohibited class. As a matter of strict law it is only necessary that the agreement between Ding and Lortie contemplated bringing in Chinese of the excluded class. We are dealing not with the consummated offense of violating section eleven of the Chinese Exclusion Act, viz: unlawfully bringing Chinese into the United States, but with a con-

spiracy to bring them into the United States which was followed by certain overt acts. As the Federal Courts have frequently said in discussing the offense of conspiracy, defined by Section 37 of the Penal Code, a conspiracy is not measured by its successful termination. The offense consists of the unlawful meeting of the minds followed by the overt act.

It would only be necessary to prove this unlawful understanding, together with an attempt in the form of an overt act to carry it out. A mere trip to the boat in Seattle for the purpose of going to Vancouver for Chinese would quite likely be sufficient to make out a criminal conspiracy, if made and carried out pursuant to a previous understanding, even though they were arrested at the dock. The kind of Chinese which were actually brought into the United States is quite immaterial except as it throws light on the enterprise as a whole.

Reviewing the circumstances of the proof as disclosed by the printed record, we find the following:

Lortie, Miller and Kirkland arranged to make a smuggling trip to Vancouver. Lortie saw Ding

and arranged to bring in Chinese for Ding, he, Ding, giving Lortie a Chinese letter which called for eight Chinese. Lortie was to receive one hundred dollars per head. This meeting took place in Louie Ding's gambling house on King Street, Seattle. Lortie made his arrangements with Miller and Kirkland and went with them to Vancouver. There they procured seven Chinese altogether and returned with them to Seattle. Lortie left the smuggling launch and his white associates and returned to Seattle alone by other conveyance.

When Miller and Kirkland arrived in Seattle harbor, they went to the foot of Harrison Street, which is some distance from the center of the city in a sequestered part of the waterfront. The party arrived after dark. One of the white men telephoned Lortie, who went out to the Harrison Street wharf. Here he met Miller, who turned over five Chinese to him. Lortie then took them in charge and brought or lead them to a point near the Milwaukee Hotel, in Chinatown, where he delivered them to one China Dan, for Louie Ding. Later Miller and Lortie went to a flat, No. 1037 Main

Street, Seattle, where Lortie received his pay from Ding. The Chinese were brought directly from Vancouver to Seattle. They were not taken to the Chinese Inspector of the Immigration Service. On the contrary they were brought to a sequestered place on the Seattle waterfront in the darkness and there landed and then taken by Lortie to Chinatown. Men are not paid money at the rate of one hundred dollars per head to bring Chinese of the privileged class from Vancouver to the United States. If these men were of the privileged class of Chinese they would have procured entry through the United States Immigration office in Vancouver. The United States had formerly and at the time in question a special arrangement for the examination of American bound Chinese in Vancouver and an office there for that purpose, in addition to the service maintained at the Chinese Entry Ports in the United States. Judicial notice will be taken of the law which requires Chinese to enter at certain designated ports in the United States. The law requires them to submit also to a very rigid examination, both under the Chinese Exclusion Acts and the general immigration laws. Honest



Chinese do not enter the United States in small launches in the darkness, and without submitting themselves to the authorities for examination, debark in the darkness and go to Chinatown, to be swallowed up in the Chinese underworld.

Again, taking judicial notice of the requirements of the law, together with the manner of entry proven in this case, it is clear that these Chinese were of the excluded class, to-wit, laborers. The privileged class include the Chinese Government officials and representatives, merchants, tourists, scientists and students. These are well-to-do Chinese citizens who are duly accredited with passports, official records and identification papers, and they never find it necessary to come in by the "underground railway."

These facts, together with the agreement for the entry between Lortie and Ding, and the Chinese letters referred to in the evidence, will leave no doubt in the minds of the court that the proof in this case disclosed a conspiracy to bring in Chinese of the prohibited class. (Trans. pp. 37 to 60, inc.).

The case of *Dahl vs. U. S.*, decided by this

court in 234 Fed. 618, is enlightening upon this point. An indictment similar to the one at bar, drawn by the writer was sustained in that case as one charging a conspiracy in general terms to bring in Chinese. And the indictment in the instant case was amply supported by the evidence.

The proof shows that the conspiracy contemplated bringing in Chinese generally and that they were of the excluded class.

### THIRD.

Counsel's remaining claim of error arising out of the joinder of defendants, Toy and Ding, is found in his third brief subdivision where it is argued that Ding was denied the number of challenges the law allows to a defendant charged with a felony other than murder or treason, to-wit, ten.

The court required defendants Toy and Ding to join in their challenges and allowed them only ten jointly.

Section 287 of the Judicial Code of the United States is an effectual answer to this contention, to-wit:

“Sec. 287, Judicial Code, 36 Stat. at L. 1166, Comp. St. 1911, p. 241, 1912 Supp. F. S. A. v. 1, p. 248. ‘When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.’ ”

See also the case of *Emanuel vs. United States*, 196 Fed. 317, charging a criminal conspiracy, which sustains the statute above in its application to criminal cases.

The *Betts* case cited by counsel for Plaintiff in Error is distinguished and explained in the *Emanuel* case in the following statement:

“The case mainly relied on by the defendant is *Betts vs. United States*, 132 Fed. 452,

but in that case there was no consolidation. Nine indictments were tried at the same time. In the case at bar, however, the several indictments were consolidated into a single cause with one plaintiff and five defendants."

In reply to the second claim of error in counsel's third subdivision wherein it is urged that reversible error was committed in allowing the jurors who sat in the first case against Louis Ding to remain on the panel from which the second jury was selected, we first observe that no juror who sat on the first Ding case was permitted to serve on the second (instant) case. The record discloses that counsel exhausted ten challenges and that with these ten, and one or two others who were excused for cause, the twelve jurors who sat in the first Ding case were excused. (See Transcript pp. 63 to 65, inc.). While there is some confusion in the cases as to whether jurors who sat upon a previous trial of the defendant then charged with another crime are competent to sit upon a later case involving the same defendant, yet we believe the weight of authority sustains this proposition. This point has not been considered by the federal courts

in recent years. However, in *United States vs. Watkins*, Fed. Cas. No. 16,649, this proposition was sustained. The court held that no objection could be raised to a juror because he had been one of the jurors in another case against the same defendant for a different offense.

See also *Commonwealth vs. Hill*, 86 Mass. (4. Allen) 591.

Again in the case of *United States vs. Wilson*, Fed. Cas. No. 16,730, it was held not to be ground of challenge that a juror sat in a previous case and returned a verdict of guilty, although it was good cause to submit his indifference to triers. The statute now places the burden of trying the juror's *voir dire* qualifications upon the court.

See also *Patterson vs. State*, 48 N. J. L., 381; 4 Atl. 449;

See also Vol. 31, *Century Digest*, "Jury," Sec. 429;

See also cases cited in Vol. 12, *Dec. Dig.* "Jury," Sec. 95;

See also *Abbotts Trial Brief* (Criminal Causes) Sec. 294,



where the text is quoted as follows:

“Having served as a juror in another cause against the same defendant unless involving the same facts, is not a disqualification.”

*Thornton on Juries*, Sec. 101;

See also *Baker vs. Harris* (Thirston) N. C. 277.

#### FOURTH.

In answering counsel's fourth brief division upon the question of Kirkland's competency, counsel for defendant in error find themselves in a rather anomalous position upon the merits of the question raised. We say anomalous, for we find ourselves upon both sides of this question and are now in a position of one astride a fence in doubt which side to descend. William Kirkland was a defendant in the case. After arrest he very frankly told the officers charged with prosecution all of the details of his offense and the part each one of the several defendants took in the criminal enterprise made the subject of indictment in the instant case. He expressed his entire willingness to appear as a government witness after his own plea had been

taken. He was called on behalf of the government as a witness. As he stepped forward to be sworn, Mr. Riddell for the defendant Toy, objected to him being sworn upon the ground that he was an atheist and as such incompetent to testify in any cause. We were then called upon to resist this objection, or at least to meet and answer it if possible. We cited such cases as were available over night and the next morning the court after some further discussion sustained Mr. Riddell's contention in respect to Kirkland and refused to allow him to be sworn as a witness. This was after his *voir dire* examination had disclosed the fact that Kirkland did not believe in any future reward or punishment, but on the contrary believed that one received punishment in this world for wrong doing.

The case against the defendant Toy depended almost entirely on Kirkland though there were some corroborating circumstances. When the court held Kirkland disqualified by reason of his lack of belief in a Supreme Being who would punish wrong doing, Toy at the close of the government's case moved for a directed verdict which was granted, and thereafter

the cause proceeded against Ding alone who was the only defendant left on trial. During the presentation of Ding's defense, Judge Bell, who was trial counsel in this case, called the same Kirkland to the stand and offered him as a defense witness for Ding. The court already having disqualified him as a government witness, refused to allow him to testify unless the government would agree that he might. Believing that it is a poor rule which does not work both ways counsel for the prosecution objected.

We now find ourselves supporting our judgment of conviction in this cause. Before attempting to discuss this question upon the merits it occurs to us that there is one insuperable objection to counsel's position, viz., that he has not shown that prejudicial error resulted from the court's ruling. His proffer of the witness was not accompanied by any offer to prove a fact or series of facts material and necessary to Ding's defense. From aught that appears counsel may have wished to prove some immaterial and inconsequential matter. It may have been material but cumulative

only. Materiality or competency does not necessarily go to the value, weight or quality of the evidence, for in the chain of events, the fact while material, may have been remote, inconsequential and of little or doubtful value; and, until its value is shown by an offer of proof the court cannot say whether its rejection constituted prejudicial and therefore reversible error or whether the error was inconsequential and harmless.

The rule in the federal court seems to be that an appellate court will not review alleged errors in the admission of evidence unless the objection clearly states the reason why the evidence is inadmissible. In commenting upon this rule the court of appeals for the Sixth Circuit, in the case of *Steers vs. United States*, 192 Fed. 1, said:

“Error cannot well be assigned on such a record.”

Also *Kern vs. United States*, in the same circuit, reported in 169 Fed. 617:

“On the trial counsel for the defendant offered in evidence the original records and files in the case in the state court. On objec-

tion by the District Attorney on the ground, among others, that the originals were not receivable but certified copies only, they were excluded. Assuming that the objection was untenable counsel for the defendant did not take the necessary steps to save his point. The contents of the records and files are not shown and it does not appear that they contained anything which would serve the purpose for which they were offered. There was no statement to the court of any particular matter contained therein which would be relevant to the issue. In these circumstances there is nothing to show that the defendant was harmed by the exclusion of the evidence."

This and many other cases sustains the familiar rule that the rejection of evidence will not be reviewed in an appellate court unless its materiality and competency is shown. In the case at bar there was nothing to show the materiality of Kirkland's testimony, and we cannot but feel that this offer of a government witness who had been rejected by the court in the presentation of the government's case, was but a strategic step by adroit and learned counsel to inject reversible error into the record without any real purpose to prove any material



fact by this particular witness.

Coming to the merits of the question we have carefully reviewed the leading case of *Omichund vs. Barker*, decided by Lord Chief Justice Willes in 1744. The rule was there announced in passing upon the qualification of a Hindu, that a belief in a Supreme Being who would punish false swearing either in this life or in some future life was sufficient to qualify a witness and permit him to take an oath. This case was later approved in the case of *Attorney General vs. Bradlaugh*, decided in 1885, and reported in 14 Law Rep. Q. B. D. 696. Here a member of Parliament was on trial in an action brought by the government to recover penalties and fines in two counts for 500 pounds each for violating the Parliamentary Oaths Act, in that he had voted in Parliament without taking an oath. The member in question did not believe in the existence of a Supreme Being, and the penalty was sustained by the High Court of Appeals in England. In this lengthy and well considered case the earlier case of *Omichund vs. Barker, supra*, was discussed at length. It was said by the judges in the *Bradlaugh*

case that the decision of Justice Willes, Master of the Rolls, had been adopted as the law of England upon the subject from the time the opinion was rendered in 1744 to the time of the discussion of the *Bradlaugh* case, and that it undoubtedly establishes the law of England upon that subject.

It will be noted that the *Omichund* case requires a belief in a Supreme Being who administers punishment. While there was in the record some testimony by Kirkland to the effect that he believed one received his punishment in this life, yet he made reply to Judge Neterer that he did not believe it came from God. This question was put to the defendant:

“Q. As a matter of fact your belief is that the punishment you receive in this world comes from yourself and from the men in the world?

A. Yes.

Q. And not from God?

A. No, I don't think it comes from God.”

It will thus be seen that Kirkland's disqualification went to the absolute disbelief in God or a Supreme Being. This belief in a Supreme Being

was one of the essential things, according to the *Omichund* case. It is true Kirkland brought himself half way within the rule by saying that he believed one received his punishment on this earth, but his case is differentiated from the *Omichund* case, for in that case the Hindu believed that he would receive punishment from a Supreme Being, for making false oath.

In order to clearly acquaint this court with Justice Willes' ruling, we quote at some length from the opinion of the High Court of Appeals in 1885 in the *Bradlaugh* case as follows:

“What is the law with regard to that? Can a person in that frame of mind (the jury found Bradlaugh had no belief in a Supreme Being), according to the law of England, and according to the intention of this Act of Parliament, take an oath? Now the law has been accepted and acted upon with regard to that point in accordance with and as governed by the decision given in *Omichund vs. Barker* ever since that case was decided, and the law has been by every judge who has had to speak of it, really and truly according to the judgment of Willes C. J. in that case. His has always been taken to be the most prominent and most

satisfactory judgment. His judgment is in this form: 'I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may and ought, to be admitted as witnesses in this, though a Christian country.' Observe the care with which he puts it, 'such infidels as believe in a God, and that He will punish them'—he does not say when, where, or how—'if they swear falsely.' Now we come to the next, 'and on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God'—that is the first of these findings, 'or if they do, do not think,' this is the alternative, that is, although they do—'if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case nor under any circumstances. It is not only 'in any case' but 'nor under any circumstances' for the plain reason, because an oath cannot possibly be any tie or obligation upon them. Therefore there is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough; but if he does not believe in a God, or if believing in a God he does not think that

God will either reward or punish him in this world or the next, in either case according to the law of England as here declared a man cannot be a witness in any case, or under any circumstances, 'He cannot be a witness.' "

The common law authorities cited by Judge Neterer are set forth at length in the court's opinion, which is part of the printed record in this case. (See pp. 16-21, inc.).

We have come to conclude that Judge Neterer was right when you consider Kirkland's testimony that he did not believe in a God or a Supreme Being.

In a record in our judgment free from error, there is disclosed substantial and credible evidence establishing the defendant's guilt as charged in the indictment. Judgment of the lower court should be affirmed.

Respectfully submitted,

CLAY ALLEN,

*United States Attorney.*

WINTER S. MARTIN,

*Asst. United States Attorney.*





United States  
Circuit Court of Appeals  
For the Ninth Circuit. *ef*

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MARIAM A. PATTERSON and H. J. PATTERSON,

Appellants,

vs.

EDWARD STROECKER, as Trustee of the Estate  
of H. J. PATTERSON, a Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Territory of Alaska, Fourth Division.

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Filed

MAR 9 - 1917

F. D. Monckton,  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

A. R. HEILIG, Attorney for Defendants and Appellants,

Fairbanks, Alaska.

McGOWAN & CLARK and H. E. PRATT, Attorneys for Plaintiff and Appellee.

Fairbanks, Alaska. [1\*]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 1769.

EDWARD STROECKER, as Trustee of the Estate  
of H. J. PATTERSON, a Bankrupt,  
Plaintiff and Appellee.

vs.

MARIAM A. PATTERSON and H. J. PATTERSON,

Defendants and Appellants.

**Stipulation Relative to Printing Record.**

It is hereby stipulated that in printing the papers and records to be used on the hearing of the appeal taken in the above-entitled cause for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, that the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted in the place of said title in all papers used as a part of said record, the words "Title of court

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\*Page-number appearing at foot of page of original certified Transcript of Record.



and cause," and that all endorsements on all papers except the clerk's filing-marks and admission of service need not be printed.

Dated at Fairbanks this 7 day of December, 1916.

McGOWAN & CLARK,

H. E. PRATT,

Attorneys for Plaintiff and Appellee.

A. R. HEILIG,

Attorney for Defendants and Appellants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 7, 1916. J. E. Clark, Clerk. [2]

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[Title of Court and Cause.]

**Praeceptum for Transcript on Appeal.**

To J. E. Clark, Clerk of Above-entitled Court:

In above-entitled cause you will please prepare a transcript on appeal to the U. S. Circuit Court of Appeals, sitting at San Francisco, California, and incorporate in such transcript the following portions of the record, to wit:

Complaint.

Answer of H. J. Patterson.

Answer of Mariam A. Patterson.

Reply to answer of H. J. Patterson.

Reply to answer of Mariam A. Patterson.

Consent order for deposit of royalties in court, May 18, 1912.

Order for depositing royalties in court, Oct. 9, 1913.  
Findings of fact and conclusions of law signed by the Court.

Judgment.

Bill of exceptions and statement of evidence and order of Court allowing, settling and approving same.

Order enlarging time for filing bill of exceptions, Oct. 4, 1916.

Order enlarging time for filing bill of exceptions, Oct. 21, 1916.

Assignment of errors.

Petition for appeal.

Order allowing appeal and fixing bond.

Supersedeas and cost bond on appeal.

Citation on appeal.

Order enlarging time for filing record on appeal.

Praeceptum for transcript.

Stipulation relative to printing transcript.

A. R. HEILIG,

Attorney for Defendants and Appellants.

Received copy December 7, 1916.

McGOWAN & CLARK,

H. E. PRATT,

Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 7, 1916. J. E. Clark, Clerk. [3]

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[Title of Court and Cause.]

**Complaint.**

Comes now the above-named plaintiff and for cause of action against defendants alleges:

I.

That on the 16th day of April, 1912, H. J. Patter-

son, of Fairbanks Recording Precinct, Territory of Alaska, filed his voluntary petition in this court, the same being No. 35-B, on the records of said Court, praying that he be declared a bankrupt and be given the benefit of the National Bankruptcy Act, and on the 16th day of April, 1912, this Honorable Court duly declared said Patterson a bankrupt.

## II.

That, at an adjourned session of the first meeting of the creditors of said bankrupt, on the 4th day of May, 1912, duly and regularly called and convened by the Referee in Bankruptcy of this Court for this precinct, for the purpose of electing a trustee of the estate of said H. J. Patterson, all the creditors present whose claims had been filed and allowed, appointed this plaintiff unanimously to said office of trustee, which was accepted by plaintiff, and plaintiff thereafter duly and regularly qualified as such trustee, in the manner prescribed by law, and ever since said time has been, and now is, the duly appointed, qualified and acting trustee of the estate of [4] H. J. Patterson, a bankrupt.

## III.

That, in the petition of said bankrupt, he sets up that he has creditors whose claims amount to something over thirty-five thousand dollars and that his assets are worth only about five thousand dollars. Claims of said creditors, some of them judgment creditors, have been filed and allowed by said Referee in Bankruptcy, amounting to about \$25,000, and bankrupt's assets do not exceed the amount set forth in his petition.

## IV.

That, on the 27th day of November, 1911, said defendant H. J. Patterson was insolvent and unable to pay his debts due and owing to various persons in an amount in excess of thirty thousand dollars, while said Patterson's assets did not exceed in value the amount of ten thousand dollars, and, on said 27th day of November, 1911, said H. J. Patterson was the legal and equitable owner and entitled to the immediate and exclusive possession of an undivided one-quarter interest in that certain placer mining claim known as the Daly Bench placer mining claim, situate, lying, and being in the second tier of benches on the left limit of Esther Creek, opposite creek placer mining claim No. Three Below Discovery on said Esther Creek, all in the Fairbanks Recording Precinct, Territory of Alaska.

## V.

That, on said 27th day of November, 1911, said H. J. Patterson, for the purpose of defrauding, hindering and delaying his creditors, and especially the creditors whose claims are on file and allowed as above set forth, they being his creditors on said 27th day of November, 1911, in the same amounts and when due, without any consideration of any kind conveyed and [5] transferred, by an instrument in writing duly executed and recorded, all of his title to said one-quarter interest in said Daly Bench, to his wife, Mariam A. Patterson, and said Mariam A. Patterson received the title to said claim at said time, and is still holding it in trust for said H. J. Patterson, to aid him in defrauding and cheating his cred-



itors, and said H. J. Patterson still is the real owner thereof, although the legal title is in his wife's name, and said mining claim is not listed by said bankrupt in his said petition as belonging to him in any manner either legally or equitably.

## VI.

That, prior to said fraudulent transfer as above set forth, said H. J. Patterson was the owner of a lay or lease agreement, covering the whole of said Daly Bench hereinbefore particularly described, and thereafter and prior to the commencement of this action and prior to his adjudication in bankruptcy, for a valuable consideration, assigned and transferred said lay to H. C. Hamilton, who is now the owner and holder thereof, and is mining said ground under the terms and conditions of said original lay and said sublease made by said H. J. Patterson to said H. C. Hamilton.

## VII.

That under and by virtue of the terms and conditions of said sublease and arrangements made subsequent thereto, said H. J. Patterson was entitled to receive from said mining operations so conducted by said Hamilton five per cent of the gross output of said ground.

## VIII.

That said interest of said Patterson in said lease has never been assigned or transferred to any person or persons whomsoever, and said Patterson is now entitled to receive five [6] per cent of the gross output of said ground during the life of said lease.



IX.

That said Mariam A. Patterson claimed, by virtue of her alleged ownership of said property, to be entitled to receive said five per cent of the gross mineral output of said claim and to be the assignee of all benefits under said lease, by virtue of said transfer of said undivided one-quarter interest in and to said property, made by said H. J. Patterson to her on the 23d day of November, 1911, as aforesaid.

X.

That plaintiff herein has no objections to said layman continuing operations on said ground, and is willing to have said layman continue mining operations on payment of the royalties prescribed in said lease and sublease hereinbefore set forth.

XI.

That, on or about the 8th day of May, 1912, said H. C. Hamilton held his first cleanup on said ground from the dump extracted by him from said ground during the spring of the year 1912, and, at the time of said cleanup, the defendants above-named demanded the payment to them of five per cent of the gross output thereof.

XII.

That said Hamilton now has in his possession said five per cent of said cleanup, which he then and there refused to pay to said defendants, and will, from time to time as said winter dump is cleaned up, have other sums of money claimed by said Mariam A. Patterson under and by virtue of said fraudulent conveyance from H. J. Patterson to said Mariam A.

Patterson, hereinbefore particularly described, and said defendants Mariam [7] A. Patterson and H. J. Patterson will demand and receive from said H. C. Hamilton said five per cent of said gross output, unless restrained by this Court.

### XIII.

That plaintiff is informed and believes and so alleges that said Mariam A. Patterson is insolvent, and that, if said Mariam A. Patterson secures possession of said five per cent of the gross output of said ground, it will be forever lost to the creditors of said H. J. Patterson and to plaintiff herein as trustee thereof.

### XIV.

That plaintiff is informed and believes and so alleges that said Mariam A. Patterson has no right, title, or interest in or to said gold and gold-dust or any part thereof, and that plaintiff herein is entitled to receive said five per cent of said gross output, by virtue of being trustee for the creditors of said H. J. Patterson, and said sum should be applied toward the payment of said creditors' claims.

### XV.

That a receiver should be appointed to receive said gold and gold-dust and to hold the same until the title thereto can be ascertained, or to pay the same into the registry of this Court, there to be held until the title to the same can be determined.

### XVI.

That plaintiff has no plain, speedy, or adequate remedy at law, and no means of enforcing his right to collect said five per cent of the gross output of said

ground, without the intervention of a Court of Equity. [8]

WHEREFORE: Plaintiff prays as follows, to wit:

1.

For a temporary restraining order, restraining the said defendants, and each of them, their agents, representatives, servants, employees and attorneys, from demanding or attempting to collect or receive said five per cent of the gross mineral output of said Daly Bench placer mining claim or any part thereof, until the further orders of this Court.

2.

That a receiver be appointed, with authority to demand and receive from said H. C. Hamilton, or his representatives or assigns, five per cent of the gross mineral output of said Daly Bench, and to hold the same until the ownership thereof can be determined by this Court; or, for an order directing the said H. C. Hamilton, his agents or assigns, to pay said five per cent of the gross mineral output of said claim into the registry of this Court, there to await the further disposition thereof by order of this Court.

3.

For a decree of this Court, decreeing that the transfer from said H. J. Patterson to said Mariam A. Patterson was fraudulent and is void, and was made by said H. J. Patterson with the purpose, intention, and design of cheating, defrauding, hindering, and delaying his said creditors and that said Mariam A. Patterson holds the title to an undivided one-quarter interest in said Daly Bench in trust for H. J. Patter-

son and, by virtue of the appointment of the plaintiff herein as trustee for the creditors of said H. J. Patterson, in trust for said plaintiff herein as successor in interest of said H. J. Patterson. [9]

4.

For a decree of this Court, decreeing that said Mariam A. Patterson has no right, title or interest in or to said property or any part thereof, or in or to any gold or gold-dust extracted therefrom.

5.

For a decree of this Court, decreeing that plaintiff herein is entitled to receive five per cent of the gross mineral output of said ground, as trustee for the creditors of said H. J. Patterson.

6.

For an order of this Court, directing said Mariam A. Patterson to reconvey said property, to wit, an undivided one-quarter interest in and to the Daly Bench placer mining claim, hereinbefore particularly described, to the plaintiff herein as trustee for the creditors of H. J. Patterson, a bankrupt.

7.

For an order fixing the time and place when said defendants shall appear and show cause, if any they have, why said restraining order should not be continued during the pendency of this action.

8.

For costs of suit and for such other and further relief as is just, meet, and equitable in the premises.

LOUIS K. PRATT & SON,  
McGOWAN & CLARK,

Attorneys for Plaintiff. [10]



Territory of Alaska,  
Fairbanks Precinct.

Edward Stroecker, being first duly sworn according to law, on his oath deposes and says:

I am the plaintiff in the above-entitled action; I have read the within and foregoing complaint, know the contents thereof, and the same is true as I verily believe.

EDWARD STROECKER.

Subscribed and sworn to before me this eleventh day of May, A. D. one thousand nine hundred twelve.

[Seal] JOHN A. CLARK,  
Notary Public in and for the Territory of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1912. C. C. Page, Clerk.  
By H. C. Green, Deputy. [11]

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[Title of Court and Cause.]

**Separate Answer of Mariam A. Patterson.**

Comes now the defendant Mariam A. Patterson and for her separate answer to the complaint herein,—

Denies each and every allegation contained in paragraph IV thereof, excepting that she admits that on the morning of November 27, 1911, the bare legal title to an undivided one-quarter interest in the mining claim described in said paragraph stood in the name of H. J. Patterson, and alleges that at that time the said H. J. Patterson was not the actual, real or equitable owner of said interest, but that she, this de-



fendant, was at that time, and had been for a long time prior thereto, the actual, real and equitable owner thereof.

2. Denies each and every allegation contained in paragraph V thereof, excepting that she admits that in the evening of November 27, 1911, the said H. J. Patterson did, by instrument in writing duly executed and delivered, convey to this defendant the bare legal title to said quarter interest theretofore standing in his name, and that this defendant then and there received the bare legal title to said interest, and that the legal title to said interest has since said time been, and now is, in this defendant, and admits that said interest is not listed by the said H. J. Patterson in his schedule of assets in said bankruptcy proceedings.

3. Denies the allegation contained in paragraph VI that said H. J. Patterson was the owner of a lease covering the whole of said Daly Bench, but admits that prior to the transfer by him to her of the bare legal title to said quarter interest he had a lay or lease upon the undivided three-fourths interest in said Bench belonging [12] to James Wickersham, and admits that he assigned said lease to H. C. Hamilton and that he executed a lease of the other quarter interest belonging to this defendant to the said Hamilton shortly before he transferred to her the bare legal title thereto theretofore held by him.

4. Denies the allegation contained in paragraph VII that said H. J. Patterson was at any time entitled to receive from the mining operations conducted by said Hamilton five per cent or any part of

the gross output of said ground by virtue of his alleged ownership of a quarter interest therein, but alleges that this defendant was then and is now entitled to receive said five per cent of the gross output of the actual, legal and equitable owner of said quarter interest.

5. Denies each and every allegation contained in paragraphs VIII, XIII, XIV, XV and XVI thereof.

6. She admits that she claims to be entitled to receive the five per cent of the gross output of said mining claim, referred to in paragraph IX, but denies that her claim is based solely upon the transfer to her of the bare legal title to said quarter interest made by said H. J. Patterson to her on November 27, 1911, and alleges that long prior to said date she was the actual, real and equitable owner of said quarter interest, and now is the actual, legal and equitable owner thereof.

7. She denies the allegation contained in paragraph XI that the said H. J. Patterson demanded the payment to himself of five per cent of the gross output of said mining claim at the first cleanup, but admits that she demanded payment to her at the first cleanup of five per cent of the gross output, upon the ground that she was the owner of a quarter interest in said mining claim. [13]

And for a further defense and as an affirmative answer this defendant Mariam A. Patterson alleges:

1. That on the 19th day of September, 1910, James Wickersham was the sole owner of placer mining claim known as the Daly Bench, situate on the left limit of Esther creek, in the Fairbanks Re-

cording District, Alaska; that on said date said Wickersham entered into an agreement with H. J. Patterson, whereby said Wickersham agreed to convey to said H. J. Patterson an undivided one-quarter interest in said mining claim if said H. J. Patterson would sink a hole to bedrock upon said claim and do the assessment work thereon for the year 1910.

2. That said H. J. Patterson agreed to said conditions, but desired to use what money he had for other purposes, and therefore, with the knowledge and consent of the said Wickersham, agreed with this defendant that if she would pay with her own funds the expense of sinking such hole to bedrock and of doing said assessment work, that she should be entitled to receive, and would receive, a conveyance of said quarter interest instead of said H. J. Patterson.

3. That in pursuance of the agreement thus made between this defendant and H. J. Patterson, and with H. J. Patterson and the said Wickersham, this defendant did, at her own expense, on the 20th and 21st day of September, 1910, cause to be sunk a hole to bedrock and did cause to be done the assessment work for the year 1910, upon said claim, and with funds belonging to her and which were her separate property and estate, and in which the said H. J. Patterson had no interest whatever she did on the 21st day of September, 1910, pay to the persons who performed said work at her instance and request the sum of \$225.00 for sinking such hole to bedrock and doing said assessment work. [14]

4. That before said Wickersham had time to execute a deed conveying said quarter interest as he

had agreed, he left the District of Alaska and remained without said District until late in the fall of 1911; that after said Wickersham returned to Fairbanks, said H. J. Patterson requested him to make a deed conveying said quarter interest to this defendant upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant, and delivered the same to said H. J. Patterson on or about the 10th day of November, 1911, but with the express understanding had between the said Wickersham and the said H. J. Patterson that the latter would convey the bare legal title to said quarter interest so received by him to this defendant.

5. That thereafter, when this defendant learned that said deed had been made and delivered to H. J. Patterson, she demanded from him a conveyance of the legal title to her in pursuance of his said agreement with her, whereupon said H. J. Patterson did, on the evening of November 27, 1911, by deed convey to this defendant the legal title to said quarter interest then held by him.

6. That since the 21st day of September, 1910, this defendant has been at all times and now is the equitable owner of said quarter interest, and since the 27th day of November she has been at all times and now is the owner and holder of the legal and equitable title to said quarter interest, and is now and for a long time past has been in the actual possession thereof, and is entitled to and has the present right of possession thereof.



7. That since the 21st day of September, 1910, said H. J. Patterson has had no right, title nor interest, legal or equitable, in said quarter interest, and received the bare legal title thereto on or about the 10th day of November, 1911, for the sole purpose of transferring the same to this defendant, and executed said deed of conveyance [15] to her on the 27th day of November, 1911, for the sole purpose of transferring to her the bare legal title then standing in his name and in performance of his agreement made with her on September 19, 1910, and without any intent to hinder, delay or defraud any of his creditors.

8. That during the time said H. J. Patterson held the bare legal title to said quarter interest he made a lease thereof to H. C. Hamilton, reserving for said quarter interest as rent or royalty five per cent of the gross output of gold mined by said Hamilton from said mining claim during the term of such lease; that this defendant has assented to such lease and the rents and royalties therein reserved, and by virtue of her ownership of said quarter interest she is entitled to receive five per cent of the gross output of gold mined by said Hamilton, as rent or royalty, at each and every cleanup.

Wherefore this defendant prays judgment that plaintiff is not entitled to the relief claimed by him nor any part thereof, and that she is the legal and equitable owner of the quarter interest in said mining claim described in the complaint, and is entitled to the rents and royalties accruing therefrom; and



that she recover her costs and disbursements herein.

A. R. HEILIG,

Atty. for Mariam A. Patterson.

District of Alaska,

Fourth Division,—ss.

Mariam A. Patterson, being duly sworn, deposes and says that she is one of the above-named defendants; that the allegations contained in foregoing answer are true as she verily believes.

MARIAM A. PATTERSON.

Subscribed and sworn to before me this 20 day of May, 1912.

[Seal]

ALBERT R. HEILIG,

Notary Public, District of Alaska. [16]

Received copy, May 22, 1912.

McGOWAN & CLARK,

LOUIS K. PRATT & SON,

Atty. for Pltff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 22, 1912. C. C. Page, Clerk.

[17]

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[Title of Court and Cause.]

**Separate Answer of H. J. Patterson.**

Comes now H. J. Patterson, one of the above-named defendants, and for his separate answer to the complaint herein,—

1. Denies each and every allegation contained in paragraph IV thereof, excepting that he admits that on the morning of November 27, 1911, the bare legal title to an undivided one-quarter interest in the min-

ing claim described in said paragraph stood in the name of H. J. Patterson, and alleges that at that time the said H. J. Patterson was not the actual, real nor equitable owner of said interest, but that the defendant Mariam A. Patterson was at that time, and had been for a long time prior thereto, the actual, real and equitable owner thereof.

2. Denies each and every allegation contained in paragraph V thereof, excepting that he admits that in the evening of November 27, 1911, he did, by instrument in writing duly executed and delivered, convey to the defendant Mariam A. Patterson the bare legal title to said quarter interest theretofore standing in his name, and that said defendant Mariam A. Patterson then and there received the bare, legal title to said interest, and that the legal title to said interest has since said time been, and now is, in the defendant Mariam A. Patterson, and that said interest is not listed by him in his schedule of assets filed with his petition in bankruptcy.

3. Denies the allegation contained in paragraph VI that he was the owner of a lease covering the whole of said Daly Bench, but admits that prior to the transfer by him to Mariam A. Patterson of the bare legal title to a quarter interest in said bench he had a [18] lay or lease upon the undivided three-fourths interest in said bench belonging to James Wickersham, and admits that he assigned said lease to H. C. Hamilton, and that he executed a lease of the other quarter interest belonging to the defendant Mariam A. Patterson to the said H. C. Hamilton, shortly before he transferred to the said Mariam A.

Patterson the bare legal title thereto theretofore held by him.

4. Denies the allegation contained in paragraph VII that he was at any time entitled to receive from the mining operations conducted by said Hamilton five per cent or any part of the gross output of said ground by virtue of his alleged ownership of a quarter interest therein, but alleges that the defendant Mariam A. Patterson was then and is now entitled to receive said five per cent of the gross output as the actual, legal and equitable owner of said quarter interest.

5. Denies each and every allegation contained in paragraphs VIII, XIII, XIV, XV and XVI thereof.

6. He admits that defendant Mariam A. Patterson claims to be entitled to receive the five per cent of the gross output of said mining claim, referred to in paragraph IX, but denies that her claim is based solely upon the transfer to her of the bare legal title to said quarter interest made by him on November 27, 1911, and alleges that long prior to said date she was the actual, real and equitable owner of said quarter interest, and now is the actual, legal and equitable owner thereof.

7. Denies the allegation contained in paragraph XI that he demanded the payment to himself of five per cent of the gross output of said mining claim at the first cleanup, but admits that the defendant Mariam A. Patterson demanded payment to her at the first cleanup of five per cent of the gross output.

As a further and affirmative answer to said complaint he alleges:

1. That on the 19th day of September, 1910, James Wickersham was the sole owner of the placer mining claim known as the Pat Daly Bench, situate on the left limit of Esther creek, in the Fairbanks Recording District, Alaska; that on said date said Wickersham entered into an agreement with this defendant, whereby said Wickersham agreed to convey to this defendant an undivided one-quarter interest in said mining claim if this defendant would sink a hole to bedrock upon said claim and do the assessment work thereon for the year 1910.

2. That this defendant agreed to said conditions, but desired to use what money he had for other purposes, and therefore with the knowledge and consent of the said Wickersham agreed with the defendant Mariam A. Patterson that if she would pay with her own funds the expense of sinking such hole to bedrock and of doing said assessment work, that she should be entitled to receive and would receive a conveyance of said quarter interest instead of this defendant.

3. That in pursuance of the agreement thus made between this defendant and Mariam A. Patterson and with this defendant and the said Wickersham, the defendant Mariam A. Patterson did, at her own expense, on the 20th and 21st days of September, 1910, cause to be sunk a hole to bedrock, and did cause to be done the assessment work for the year 1910 upon said claim; and with funds belonging to her and which were her separate estate and property,



and in which this defendant had no interest whatever, she did on the 21st day of September, 1910, pay the sum of \$225 for sinking such hole to bedrock and doing said assessment work.

4. That before said Wickersham had time to execute a deed conveying said quarter interest as he had agreed, he left the district of Alaska and remained without said district until late [20] in the fall of 1911; that after said Wickersham returned to Fairbanks this defendant requested said Wickersham to make a deed conveying said quarter interest to the defendant Mariam A. Patterson, upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to this defendant, and delivered the same to him on or about the 10th day of November, 1910, with the express understanding had with him at the time of such delivery that this defendant would convey the bare legal title to said quarter interest so received by him to the said Mariam A. Patterson.

5. That thereafter, when the said Mariam A. Patterson learned that said deed had been made and delivered to this defendant, she demanded from him a conveyance of the legal title to her in pursuance of their said agreement, whereupon this defendant did on the evening of the 27th day of November, 1911, by deed convey to the said Mariam A. Patterson the legal title to said quarter interest.

6. That since the 21st day of September, 1910, said Mariam A. Patterson has been at all times and now is the equitable owner of said quarter interest,



and since the 27th day of November, 1911, she has been at all times and now is the owner and holder of the legal and equitable title to said quarter interest, and is now and for a long time past has been in the actual possession thereof, and is entitled to and has the present right of possession thereof.

7. That since the 21st day of September, 1910, this defendant has had no right, title nor interest, legal or equitable, in said quarter interest, and received the bare legal title thereto on or about the 10th day of November, 1911, for the sole purpose of transferring the same to said Mariam A. Patterson, and executed said deed of conveyance to her on the 27th day of November, 1911, for the sole purpose of transferring to her the bare legal title [21] then standing in his name and in performance of his agreement made with her on September 19, 1910, and without any intent to hinder, delay or defraud any of his creditors.

8. That during the time that this defendant held the bare legal title to said quarter interest he made a lease thereof to H. C. Hamilton, reserving for said quarter interest as rent or royalty five per cent of the gross output of gold mined by said Hamilton from said mining claim during the term of such lease; that the defendant Mariam A. Patterson has assented to such lease and the rents and royalties therein reserved, and by virtue of her ownership of said quarter interest she is entitled to receive five per cent of the gross output of gold mined by said Hamilton, at each and every cleanup as such rent or royalty.

WHEREFORE this defendant prays judgment that plaintiff is not entitled to the relief claimed by him nor any part thereof, and that she, the Mariam A. Patterson, is the legal and equitable owner of the quarter interest in said mining claim and entitled to the rents and royalties accruing therefrom; and that he recover his costs and disbursements herein.

A. R. HEILIG,  
Atty. for H. J. Patterson.

District of Alaska,  
Fourth Division,—ss.

H. J. Patterson, being duly sworn, deposes and says that his is one of the above-named defendants; that the allegations contained in foregoing answer are true as he verily believes.

H. J. PATTERSON.

Subscribed and sworn to before me this 17 day of  
May, 1912.

[Seal]

ALBERT R. HEILIG,  
Notary Public, District of Alaska.

Received copy May 22, 1912.

McGOWAN & CLARK,  
LOUIS K. PRATT,  
Atty. for Plaintiff. [22]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Division. May 22, 1912. C. C. Page, Clerk. [23]

[Title of Court and Cause.]

**Reply to Answer of Mariam A. Patterson.**

Comes now the above-named plaintiff and in reply to the separate answer of defendant Mariam A. Patterson states:

Denies each and every allegation of new matter in said answer contained.

In reply to defendant Mariam A. Patterson's "Further Defense and Affirmative Answer," plaintiff states:

1. Denies the allegations contained in paragraphs 2 and 3 thereof.

2. Denies the allegations contained in paragraph 4 thereof.

3. Denies the allegations contained in paragraph 5 thereof except that he admits H. J. Patterson executed a deed, bearing the date November 27th, 1911, conveying the legal title to said quarter interest.

4. Denies each and every allegation in paragraph 6 thereof except that he admits that said defendant has been the holder of the legal title to said interest since November 27th, 1911.

5. Denies each and every allegation in paragraph 7.

6. Plaintiff has not sufficient information upon which to base a belief as to the truth or falsity of the allegations contained in paragraph 8 thereof, and therefore denies the same. [24]

WHEREFORE plaintiff prays judgment as in his complaint set forth.

McGOWAN & CLARK.

LOUIS K. PRATT & SON.

Territory of Alaska,  
Fourth Division,—ss.

Edward Stroecker, being first duly sworn, on oath says: I am the plaintiff in the above-entitled suit; I have read the foregoing reply and the allegations therein contained are true as I verily believe.

EDWARD STROECKER.

Subscribed and sworn to before me this 25th day of Sept. 1913.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

My commission expires June 24, 1916.

Service of the above reply, by receipt of copy thereof, is hereby admitted this 25th day of September, 1913.

A. R. HEILIG,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 25, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [25]

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[Title of Court and Cause.]

**Reply to Answer of Defendant H. J. Patterson.**

Comes now the above-named plaintiff and in reply to the separate answer of defendant H. J. Patterson states:

Denies each and every allegation of new matter in said answer contained.

In reply to defendant H. J. Patterson's "Further and affirmative answer," plaintiff states:

1. Denies the allegations contained in paragraphs 2, 3 and 4 thereof.

2. Denies each and every allegation of paragraph 5, except that he admits H. J. Patterson executed a deed, bearing the date November 27th, 1911, conveying the legal title to said quarter interest, to said Mariam A. Patterson.

3. Denies each and every allegation in paragraph 6 thereof, except that he admits said defendant Mariam A. Patterson has been the legal owner to said interest since Nov. 27th, 1911.

4. Denies the allegation of paragraph 7.

5. Plaintiff has not sufficient information upon which to base a belief as to the truth or falsity of the allegations contained in paragraph 8 thereof, and therefore denies the same.

WHEREFORE, plaintiff asks for the relief prayed for in his complaint.

McGOWAN & CLARK,

LOUIS K. PRATT & SON,

Attorneys for Plaintiff. [26]

United States of America,  
Territory of Alaska,—ss.

Edward Stroecker, being first duly sworn, on oath says: I am the plaintiff in the above-entitled suit; I have read the foregoing reply and the allegations therein contained are true as I verily believe.

EDWARD STROECKER.



Subscribed and sworn to before me this 25th day of Sept., 1913.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

My commission expires June 24th, 1916.

Service of the foregoing reply, by copy thereof, is hereby admitted this 25th day of September, 1913.

A. R. HEILIG,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 25, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [27]

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[Title of Court and Cause.]

**Consent Order for Deposit of Royalties.**

The above matter coming on regularly for hearing on the seventeenth day of May, A. D. one thousand nine hundred twelve, on the application of the plaintiff above named for a continuance of the temporary restraining order hereinbefore granted, *pendente lite*, at said time appearing Messrs. John A. Clark and Harry E. Pratt, attorneys for plaintiff, and Mr. A. R. Heilig, attorney for defendant, said attorneys, for their respective clients, consenting in open court that five per cent of the gross output of gold and gold-dust and other precious metals and minerals extracted from the Daly Bench on the left limit of Esther Creek, particularly described in the complaint on file herein, shall be deposited by H. C. Hamilton, the layman operating said ground, with

the Clerk of this Court during the pendency of this action, and that said Clerk be authorized to convert said gold-dust into cash, and the Court being fully advised in the premises,—

IT IS THEREFORE ORDERED that H. C. Hamilton, layman or lessee of the Daly Bench, situate in the second tier of benches on the left limit of Esther Creek, opposite first tier bench claims Nos. Three and Four Below Discovery on said Esther Creek, after each cleanup hereafter held on said ground, during the pendency of this action, deposit five per cent of the gross amount of each and every cleanup, said sum being the amount in dispute between plaintiff and defendant, with the Clerk of this Court, to await the outcome of the above-entitled action, or [28] until further orders of this Court.

Be it further ordered that the Clerk of this Court be, and he is, hereby authorized to convert all gold and gold-dust so deposited with him by said H. C. Hamilton in the above-entitled cause, into cash, and for that purpose he may sell the same to any bank or banker or private individual in the town of Fairbanks, Alaska, at the current market price thereof, and shall hold the proceeds of such sale in lieu of the gold-dust itself.

Be it further ordered that the restraining order heretofore by this Court issued in the above-entitled cause, wherein defendants are restrained from demanding, receiving, or attempting to collect said five per cent of the gross output of said Daly Bench, be and remain in full force and effect until further order of this Court.

Done at Fairbanks, Alaska, on this eighteenth day of May, A. D. one thousand nine hundred twelve.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal, No. 12, page 9.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 18, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [29]

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[Title of Court and Cause.]

**Order to Deposit Money in Registry of Court.**

This matter coming on for hearing, on the application of attorney for defendant for an order requiring the American Bank of Alaska to deposit in the registry of this Court certain moneys deposited with said bank by Henry C. Hamilton, during the season of 1912, as royalties derived from the Daly Bench on Esther Creek, payable to the owner of the interest in said Daly Bench which is in litigation in the above-entitled action, and it appearing to the satisfaction of this Court that, shortly after the institution of said action, by stipulation of the attorneys for the respective parties, this Court made an order, directing said Henry C. Hamilton to pay into the registry of this Court all royalties derived from the one-quarter interest claimed by the defendant Mariam A. Patterson, to await the outcome of this action, and it further appearing to the satisfaction of this Court that said royalties were, by said Henry C. Hamilton, paid and delivered to the American Bank of Alaska, and inadvertently were not paid in to the registry

of this Court, but were merely deposited by said Henry C. Hamilton with said American Bank of Alaska for safekeeping, and that, since said time, said gold-dust has been converted into money and is now held by said American Bank of Alaska subject to the order of this Court, and it further appearing that said Henry C. Hamilton is, at the present time, absent from the town of Fairbanks and cannot personally give directions concerning said gold-dust. [30]

Now, therefore, it is ordered that said American Bank of Alaska pay and deliver to the Clerk of this Court money equivalent in value to the amount of the gold-dust so deposited with said bank by said Henry C. Hamilton for safekeeping as aforesaid, and that, on the return of said Henry C. Hamilton to Fairbanks, if it is ascertained that any portion of said gold-dust so deposited by him was not properly deposited as royalties from said Daly Bench, said Henry C. Hamilton may apply to this Court for such order concerning the disposition of said money as may be proper in the premises, and that all said money so deposited by said American Bank of Alaska in the registry of this Court be held by the Clerk of this Court subject to the order of this Court.

Done in open court at Fairbanks, Alaska, on this ninth day of October, A. D. one thousand nine hundred thirteen.

F. E. FULLER,  
District Judge.

Entered in Court Journal No. 12, page 719.



[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 9, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy. [31]

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[Title of Court and Cause.]

**Findings of Fact and Conclusions of Law.**

The above-entitled cause coming on regularly for trial on the 18th day of April, 1916, the plaintiff appearing in person and by and through his attorneys, Messrs. McGowan & Clark and Mr. Harry E. Pratt, and the defendants appearing in person and by and through their attorney, Mr. A. R. Heilig, and both sides having announced themselves ready for trial, and the trial having thereupon proceeded, and oral and documentary evidence having been introduced for and on behalf of both plaintiff and defendants, and the matter having been fully argued by counsel for the respective parties and having been submitted to the Court for decision, and the Court having thereafter and on the 15th day of May, 1916, announced its decision in said matter;

Now, therefore, in pursuance thereof, the Court does now find and establish the following as its findings of fact and conclusions of law in said cause, to wit:

**FINDINGS OF FACT.**

(1) That on and prior to the 19th day of September, 1910, James Wickersham was the owner in fee, subject only to the paramount title of the United States, in possession of, and entitled to the possession of that certain placer mining claim, known as



the Daly Bench, situate on the left limit of Esther Creek, in the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska, and that on or about said date said James Wickersham entered into a written agreement with H. J. Patterson, whereby said Wickersham agreed to convey to said H. J. Patterson an undivided one-quarter interest in and to said mining [32] claim if said H. J. Patterson would, at his own expense sink one hole to bedrock on said claim and do the assessment work thereon for the year 1910, which said agreement was coupled with a lease of the whole of said premises.

(2) That thereafter said H. J. Patterson entered into an oral agreement with his wife Mariam A. Patterson, one of the defendants herein, whereby said Mariam A. Patterson, in consideration of pay the money necessary to fulfill the terms of said agreement with said Wickersham relative to acquiring a one-quarter interest in said ground, should be the owner of a one-quarter interest when title was acquired thereto, and said Mariam A. Patterson, on 21 September, 1910, paid to Fred Craig the sum of \$225, which sum was the sum necessary to be paid for causing two drill-holes to be sunk to bedrock on said ground, said work being performed in the month of September, 1910, and the money so paid by her was part of her own funds which she had at the time mentioned and prior thereto on deposit in bank in her own name, and which money was her sole and separate property, in and to which her husband H. J. Patterson had no interest or right whatsoever.

(3) That thereafter the defendant H. J. Patterson abandoned said lease and did no work thereunder, and subsequent to said abandonment of said lease by said H. J. Patterson a controversy arose between the stakers of the Happy Home Association claim, adjoining said Daly Bench, and the owners of said Daly Bench, relative to the ownership of the greater portion of said Daly Bench, and said matters so in controversy were settled and adjusted between said parties on the 8th day of November, 1911, and said James Wickersham and H. J. Patterson, for the purpose of compromising said dispute, assigned and transferred to the owners of said Happy Home Association claim and their lessees a strip of ground 75 feet in width, off of the upper end of the Daly Bench, running up and down the general course of Esther Creek and parallel to the northerly line of said claim.

(4) That prior to the settlement of said controversy last referred to and on or about the 14th day of October, 1911, James Wickersham made and executed a [33] deed to H. J. Patterson for an undivided one-quarter interest in and to said Daly Bench hereinbefore referred to, for the recited consideration of one dollar, and in consideration of the doing of the assessment work thereon by the vendee for the year 1910, in compliance with the United States statutes, which said deed was delivered to said H. J. Patterson subsequent to the 8th day of November, 1911, and was by him duly filed for record on the 10th day of November, 1911, in the office of the Recorder of the Fairbanks Mining and Record-

ing Precinct, Territory of Alaska, which said deed was executed by said James Wickersham to said H. J. Patterson as grantee therein without the knowledge or consent of Mariam A. Patterson, and said Wickersham delivered said deed to said H. J. Patterson on the 10th day of November, 1911, and at the same time consented that H. J. Patterson convey said one-quarter interest to anyone he chose.

(5) That prior to the execution of said deed by said James Wickersham to H. J. Patterson, as set forth in finding No. 4 hereof, and on the 12th day of October, 1911, said James Wickersham made, executed, and delivered to said H. J. Patterson a lease covering all the Daly Bench placer mining claim, together with all appurtenances, and the right and privilege to prospect and mine the same and extract therefrom all the gold-bearing placers therein contained, subject to the following condition, to wit:

“As part consideration of this lease the party of the second part agreed that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-

fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease.”

That the term of said lease, as therein provided, was from the date thereof until the 12th day of October, 1915, unless sooner determined or forfeited through failure on the part of the lessee to pay and deliver the rents and [34] royalties agreed upon, or for other violations of the conditions thereof; said lease also provided, among other things, that the lessee, as royalties and rentals, should pay and deliver to the lessor therein 25 per cent or one-quarter of the gross amount of each and every cleanup at the time the same was finished; and also contained the following provision, to wit:

“And it is of the essence of this contract, and the party of the second part hereby specially agrees to pay and to deliver to the party of the first part, or to his duly authorized agent, in consideration of this lease, as the share, royalty and rental of the party of the first part twenty-five (25 per cent) per cent or a full one-fourth of the gross amount of all gold-dust and other mineral extracted, mined, taken or produced from the whole of the said premises during the whole of the term of this lease or lay, and agrees to pay and deliver said one-fourth part of the said gross output of the whole of said mining claim to the said party of the first part or his duly authorized agent immediately



upon and after each clean-up is so made, without delay or default for any reason whatever.”

Said lease also recited that James Wickersham, the lessor therein named, was the owner of an undivided three-quarters interest in and to the property covered by said lease, and H. J. Patterson, the lessee, the owner of an undivided one-quarter thereof, and said lease was on the 10th day of November, 1911, filed for record in the office of the Recorder of the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska, and recorded in volume 5 of Leases, at page 216 thereof.

(6) That thereafter and on the 29th day of January, 1912, the lessor therein named consented that the share or royalty to be paid to said lessor should be reduced from 25 per cent to 20 per cent of the gross output of the ground described in said lease, and that in all other respects the lease should remain in its original form.

(7) That subsequent to the execution of said lease from said James Wickersham to said H. J. Patterson, dated 12 October, 1911, to wit, on 27 November, 1911, said H. J. Patterson executed and delivered to H. C. Hamilton an instrument, of which the following is a copy:

“This indenture of lease made and entered into this 27th day of November, 1911, by and between H. J. Patterson of Fairbanks, Alaska, as party of the first part, and H. C. Hamilton of the same place as party of the second part, witnesseth:



“Whereas, by indenture of lease dated October 12, 1911, James Wickersham did lease, let and demise unto the said H. J. Patterson that certain [35] placer mining claim known as the ‘Daly Bench,’ situate on the left limit of Esther Creek, second tier, about opposite creek claim number three below discovery on said creek, in the Fairbanks Recording District, Alaska, for the term commencing October 12, 1911, and ending October 12, 1915;

And whereas said James Wickersham has consented to the subletting of said demised premises by the said H. J. Patterson to the said H. C. Hamilton upon the terms and conditions in said lease set forth;

Now, therefore, this indenture witnesseth that the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham and in his own right as owner of an undivided one-fourth part of the title to said mining claim, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915, upon the same terms, conditions and covenants and subject to the same terms and conditions as in said lease from James Wickersham to said H. J. Patterson set forth, excepting, however, that the said H. C. Hamilton shall pay as royalty and rental as such les-

see twenty-five per cent of the gross amount of each and every cleanup of gold and gold-dust made by him upon said demised premises to the said James Wickersham, and shall pay in addition thereto five per cent of the gross amount of each and every cleanup of gold and gold-dust made by him upon said premises to the said H. J. Patterson, but in all other respects the terms, covenants and conditions of said lease from Wickersham to Patterson shall be binding upon the said H. C. Hamilton with the same force and effect and to all intents and purposes as if he were a party named as lessee in said lease.

And the said H. C. Hamilton hereby agrees to comply with and perform all the covenants and conditions in this lease contained and as well those contained in said lease from Wickersham to Patterson to the same extent and effect as if they were fully set out and repeated in this indenture, and to that end said lease and the terms, covenants and conditions therein referred to and hereby referred to and made a part of this lease.

In witness whereof the parties of the first and second part have hereunto set their hands and seals this 27th day of November, 1911.

H. J. PATTERSON. (Seal)

H. C. HAMILTON. (Seal)"

Which said instrument was duly executed in the manner described by law and said Hamilton there-

upon entered upon said ground and commenced the prosecution of mining operations thereon.

(8) That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from said Wickersham to H. J. Patterson, dated 12 October, 1911, and knew the terms and conditions thereof, and had knowledge of and was fully informed of the terms and conditions of the assignment of said lease from said H. J. *Hamilton* to said H. C. Hamilton, dated 27 November, 1911, and assented thereto.

(9) That subsequent to the execution of said assignment to said H. C. Hamilton, but on the same day that said assignment was made, H. J. Patterson [36] caused to be prepared and executed a deed in proper form, to the defendant Mariam A. Patterson, his wife, wherein it is recited:

“That the party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, and sold, conveyed, remised, released, and quitclaimed, and by these presents doth grant, bargain, sell, convey, remise, release, and forever quitclaim, unto the said party of the second part, her heirs and assigns, all of his right, title, and interest, being an undivided one-fourth interest of, in, and to that certain bench placer mining claim, situate in the Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly

Bench placer mining claim, being the second bench claim on the left limit and about opposite No. Three (3) creek claim below Discovery on said Ester Creek, and located by Pat Daly on December 1st, 1905, to have and to hold the same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever."

That the real consideration of the deed from H. J. Patterson to Mariam A. Patterson was the payment by the latter of the expenses of sinking the said holes to bedrock and doing the assessment work for the year 1910 with her own money and the performance of his said promise made on 19 September, 1910.

(10) That the said H. J. Patterson did not at any time assign, transfer, or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton, wherein said H. J. Patterson reserved to himself five per cent of the gross output of said claim, and no transfer of said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam A. Patterson.

(11) That said H. C. Hamilton, and other parties working under him, extracted large quantities of gold-bearing gravel and earth from the said Daly Bench, and in the spring of the year 1912 cleaned up the dumps of gold-bearing gravel and earth so extracted from said ground, and said defendant Mariam A. Patterson demanded five per cent



thereof as owner of the property, claiming the same as royalties due to her by virtue of being the owner of an undivided one-quarter interest in said Daly Bench, and plaintiff in this action as trustee for the creditors of said H. J. Patterson, a bankrupt, instituted this action in this court, wherein certain orders were made, and said five per cent of the gross output of said claim, extracted during the year 1912, amounting to the sum of \$5,174.66, was thereafter deposited in the registry of this court and was there [37] held to await the outcome of this action.

(12) That subsequent to the transfer by said H. J. Patterson to Mariam A. Patterson of an undivided one-quarter interest in said Daly Bench, as hereinabove set forth, and on the 16th day of April, 1912, defendant H. J. Patterson filed a voluntary petition in this court to be adjudged a bankrupt, and was on said date adjudged a bankrupt, and plaintiff in this action was thereafter duly appointed Trustee for the creditors of said bankrupt, and thereafter qualified as such, and ever since said time has been, and now is, the duly appointed, qualified, and acting trustee for the creditors of H. J. Patterson, a bankrupt.

(13) That the deed from H. J. Patterson to Mariam A. Patterson of said undivided one-quarter interest in and to said Daly Bench was made by him and received by her in good faith, for a valuable and sufficient consideration, and without any design on the part of either of them to hinder, delay, or defraud any creditor of the said H. J. Patterson, but for the purpose of vesting in said Mariam A. Patterson the legal title to said undivided one-quarter in-



terest in and to said Daly Bench, said Mariam A. Patterson having theretofore and since the 19th day of September, 1910, been the equitable owner thereof.

(14) That said H. J. Patterson was insolvent on the 27th day of November, 1911, and at all times subsequent thereto up until the time of his adjudication as a bankrupt.

(15) That all the moneys now in the registry of this court in this cause, to wit, the sum of \$5,174.66, are the proceeds of five per cent of the gold and gold-dust washed from the gravels extracted from the Daly Bench during the year 1912, and the said five per cent of said gold-dust is the same five per cent that was reserved to said H. J. Patterson under his agreement with said H. C. Hamilton, as hereinabove set forth.

Having found and established the foregoing as its findings of fact, this Court does now make and establish the following as its conclusions of law based thereon, to wit: [38]

#### CONCLUSIONS OF LAW.

(1) That the deed from H. J. Patterson to Mariam A. Patterson of an undivided one-quarter interest in and to said Daly Bench vested in said Mariam A. Patterson the legal title to said property, subject to the terms and conditions of that certain lease from James Wickersham to H. J. Patterson dated 12 October, 1911, and no royalties were reserved to the owner of said undivided one-quarter interest in said Daly Bench under the terms and conditions of said lease.

(2) That five per cent of the gross output of the gold and gold-dust extracted from said Daly Bench, reserved by said H. J. Patterson, in his contract with H. C. Hamilton, dated 27 November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

(3) That the deed from H. J. Patterson to Mariam A. Patterson, dated 27 November, 1911, did not transfer to said Mariam A. Patterson any part of the five per cent of the gross output of the Daly Bench, reserved by said H. J. Patterson under his contract with H. C. Hamilton, of even date therewith, and said Mariam A. Patterson acquired no right, title, or interest in or to said five per cent of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson.

(4) That said Mariam A. Patterson has no right, title, or interest in or to any part of the gold or gold-dust, or the proceeds thereof, now in the registry of this court in this cause, the same being the proceeds of five per cent of the gold and gold-dust extracted from said claim and washed from the pay-gravels therein contained, in the year 1912.

(5) That all the moneys and gold-dust now in the registry of this court in this cause are the property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered to plaintiff herein, to be disposed of by him in the manner directed by law, in his representative capacity as trustee for said creditors.

(6) That Mariam A. Patterson was at all times subsequent to about the 21st [39] day of Septem-

ber, 1910, the equitable owner of an undivided one-quarter interest in and to the Daly Bench placer mining claim, hereinabove described, and the defendant H. J. Patterson was her agent, and said Mariam A. Patterson is bound by all the acts and things done by said H. J. Patterson in connection with said interest.

(7) That said Mariam A. Patterson, under the deed from H. J. Patterson to herself, dated 27 November, 1911, received the legal title to said undivided one-quarter interest in and to said Daly Bench claim, subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson, and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title, or interest in or to any of the royalties, moneys, or gold-dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton, which said last-mentioned agreement was dated 27 November, 1911.

(8) That Mariam A. Patterson was a *bona fide* holder of said one-quarter interest for value prior to the date of the adjudication of H. J. Patterson as a bankrupt, and that she is entitled to a judgment of this Court, adjudging her to be the legal owner of a one-quarter interest in the Daly Bench placer mining claim hereinabove described.

(9) That plaintiff herein is entitled to a judgment of this Court, decreeing him to be the owner as trustee for the creditors of said H. J. Patterson,

a bankrupt, and entitled to the possession of, all the gold and gold-dust and proceeds of gold-dust now in the registry of this court in this cause, amounting to the sum of \$5,174.66, and for an order directing the clerk of this court to pay and deliver to said plaintiff all the moneys and gold-dust now held by said clerk in said cause as aforesaid.

(10) That plaintiff is entitled to entry of a judgment against defendants, and each of them, for all his costs incurred in this action.

Let judgment be entered accordingly.

Dated at Fairbanks, Alaska, on this 20th day of May, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,

District Judge. [40]

Ent. in Court Jr. No. 13, page 574.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [41]

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*In the District Court for the Territory of Alaska,  
Fourth Judicial Division.*

No. 1769.

EDWARD STROECKER, Trustee, etc.,

Plaintiff,

vs.

MARIAM A. PATTERSON et al.,

Defendants.

### **Judgment.**

This cause having come on regularly for trial on the 26th day of April, 1916, the plaintiff appearing



in person and by and through his attorneys, Messrs McGowan & Clark and Mr. Harry E. Pratt, and the defendants appearing in person and by and through their attorney, Mr. Albert R. Heilig, and both parties announcing themselves ready for trial, and the trial having thereupon proceeded, and oral and documentary evidence having been introduced for and on behalf of plaintiff and defendants, the matter having been fully argued by counsel for the respective parties, and submitted to the Court for consideration, and this Court having thereafter rendered its decision and having thereupon found, established, signed, and filed its findings of fact and conclusions of law;

Now, therefore, in pursuance thereof, on motion of the attorneys for the plaintiff, it is ordered, adjudged, and decreed as follows, to wit:

(1) That the defendant Mariam A. Patterson, at all times between the 21st day of September, 1910, and the 27th day of November, 1911, was the equitable owner of an undivided one-fourth interest in and to the Daly Bench, situate on the left limit of Esther Creek, in the Fairbanks Mining and Recording Precinct, Territory of Alaska, and the said Mariam A. Patterson was, at the [42] time of the institution of this action, and ever since the 27th day of November, 1911, was the owner of the legal and equitable title to said property as against all persons, save and except the Government of the United States.

(2) That the deed to the said property, from H. J. Patterson to Mariam A. Patterson, of date the



27th day of November, 1911, was subject to the terms and conditions of a certain lease, from James Wickersham to H. J. Patterson, dated the 12th day of October, 1911, and no royalties were reserved by the owner of said interest so conveyed to Mariam A. Patterson under the terms and conditions of said lease, and the five per cent of the gross output of all the gold and gold-dust extracted from said Daly Bench, reserved by H. J. Patterson in his contract with H. C. Hamilton, dated the 27th day of November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench, and not as the owner of an interest therein.

(3) That Mariam A. Patterson has no right, title, or interest, either legal or equitable, in or to the gold and gold-dust or the proceeds thereof, impounded with the clerk of this court in this action, amounting to the sum of \$5,174.66, and that the creditors of H. J. Patterson, a bankrupt, are the owners thereof, and that plaintiff in this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is entitled to the possession thereof, for the purpose of distributing the same in the manner prescribed by the bankruptcy laws, and that the clerk of this court be, and he is, hereby ordered and directed to pay to the plaintiff herein, as trustee for the creditors of H. J. Patterson, a bankrupt, on the first day of November, 1916, all moneys now in the hands of the clerk of this court impounded in this cause, less such percentage thereof as said clerk is by law entitled to receive for impounding the [43] same, unless said defendant Mariam A. Patterson has, on

or before the said date, filed with the said clerk of said court a supersedeas bond on appeal in this cause, duly approved by this Court, being for such sum as may hereafter be fixed by order of the Court.

(4) That the plaintiff in this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is the owner of five per cent of all the gold and gold-dust extracted from said Daly Bench subsequent to the adjudication of said H. J. Patterson, a bankrupt, reserved to said H. J. Patterson under said contract of said H. J. Patterson with H. C. Hamilton, of date of the 27th day of November, 1911, from all persons working said ground under said contract.

(5) That the plaintiff herein be, and he is, hereby given and granted judgment against the defendants, and each of them, for all his costs incurred in this action, to be taxed by the clerk of the court.

Done at Fairbanks, Alaska, this 4th day of October, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 612.

[Endorsed]: Filed in the District Court, Territory of Alaska. 4th Div. Oct. 4, 1916. J. E. Clark. Clerk. [44]

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[Title of Court and Cause.]

**Defendants' Bill of Exceptions and Statement of Evidence.**

Be it remembered that this action came on regularly for trial in above-entitled court on April 18,

1916; then appeared Messrs. McGowan & Clark and Harry E. Pratt as attorneys for plaintiff, and A. R. Heilig as attorney for defendants, and the following proceedings were had and evidence submitted.

It was then stipulated by counsel for both parties that \$5,174.66 now in the registry of this court is five per cent of the gross output of the Daly Bench placer mining claim, which fund is claimed by plaintiff as trustee of the estate of H. J. Patterson, a bankrupt, and is also claimed by Mariam A. Patterson, defendant, as her property, and is one of the subjects of controversy in this action.

It was also admitted by defendants that H. J. Patterson, on November 27, 1911, was indebted to various of his creditors in the sum of \$30,000. [45]

Upon plaintiff's offer the following agreement between James Wickersham and H. J. Patterson, dated September 19, 1910, was admitted in evidence and marked Plaintiff's Exhibit "A."

**Plaintiff's Exhibit "A"—Agreement, September 19, 1910, Between James Wickersham and H. J. Patterson.**

**AGREEMENT.**

This indenture made and entered into this 19th day of September, 1910, by and between James Wickersham, of Fairbanks, Alaska, the party of the first part, and H. J. Patterson, of Ester Creek, Fairbanks Precinct, Alaska, the party of the second part,

Witnesseth: That the party of the first part is the owner and in possession of that certain placer mining claim known as the "Daly Bench," situate on the left limit of Ester Creek in the second tier of

benches and about opposite Nos. 2 and 3 below Discovery on the said left limit of said Ester Creek, Fairbanks Precinct, Territory of Alaska, and the party of the second part desires to prospect thereof and to take a lease for the future working thereof; in consideration of the sinking of a hole from the surface to bedrock thereon for the purpose of prospecting the said ground and determining its value by the party of the second part at his own expense, the party of the first part does hereby agree to make, sign and deliver to the party of the second part a quitclaim deed to an undivided one-fourth interest in the said premises; the party of the second part undertakes hereby, in consideration of said agreement and transfer to sink said hole upon the said premises and to do the assessment work for the year 1910 without any expense whatever to the party of the first part; in further consideration of the rents, royalties, covenants and agreements hereinafter reserved and by the said party of the second part to be kept, paid and performed, the party of the *first does* hereby grant, demise, let and lease unto the said party of the second part the whole of the said premises together with all the appurtenances and the right and privilege to further prospect and mine the same and to extract therefrom all of the gold and gold-bearing rock, earth and gravel therein contained.

To have and to hold the same unto the said party of the second part from the date of this agreement until the 19th day of September, 1912, unless sooner determined or forfeited through the failure of the



party of the second part to pay and deliver the rent agreed upon or from some other violation of the terms, covenants and conditions hereinafter contained or any of them against the said party of the second part reserved.

And in consideration of the said demise the said party of the second part does covenant and agree to and with the said party of the first part as follows, to wit:

To enter upon said demised premises within a reasonable time after the signing and sealing of these presents and to dig, excavate, bore or otherwise sink one hole from the surface to bedrock upon said claim for the purpose of prospecting the said ground and doing the assessment work for the year 1910.

And the party of the second part further agrees that he make, sign [46] and cause to be recorded in the office of the Recorder in and for the Fairbanks Precinct, Territory of Alaska, an affidavit proving the doing of the assessment work thereon for the year 1910.

And the party of the second part further agrees to enter upon said premises within a reasonable time after the signing of these presents and proceed to work the same in a miner-like manner with due regard to the development, preservation and value of the said demised premises; to leave all unworked ground intact and adjacent; to operate no rocker, long tom or other kindred machine; to do no panning thereon save and except to keep account of and test the value of the ground worked, and of such pannings to keep an accurate account and include



the gross amount thereof in the gross output of gold produced from said premises ; to work and mine said demised premises steadily and continuously from the date hereof until the termination of this lease ; to well and sufficiently timber all shafts, drifts, tunnels and passageways where proper in accordance with good mining and not to drift or excavate outside the boundaries of said demised premises, and should said party of the second part so do then any damage or damages resulting therefrom to any person or persons owning or operating adjacent mines or mining ground shall be paid by the said party of the second part and save the party of the first part harmless because thereof.

And the said party of the second part hereby expressly covenants and agrees that he will not allow or permit any lien or liens to be filed or any claim of any kind to be made by, through or under him upon any part or portion of the premises or title therein claimed or owned by the party of the first part, nor shall any part or portion of the dump or dumps or the proceeds thereof or the buildings or other improvements thereon to be subjected to any lien or liens for any labor or material and as against the same the said party of the second part will hold and keep the party of the first part and the said demised premises safe and harmless, and the said party of the second part will post a notice in writing upon said premises in the name of the party of the first part giving notice that no claim or lien shall be made thereon by any laborer or materialman or other person and said notice shall be filed in accord-

ance with the statute in such case now made and provided.

And the said party of the second part further agrees to permit the party of the first part or his agent at any time to enter into and upon the said demised premises for the purpose of inspecting, testing, panning and determining the condition and value thereof and of the gold-bearing gravels therein and will permit him or his agent to inspect the books and records of the said party of the second part relating thereto and will permit him to acquire therefrom any and all information regarding the prosecution of said work by the said party of the second part.

And the said party of the second part does hereby specially agree not to assign this lease or lay or any interest therein or thereunder and not to sublet or sublease the said demised premises or any part thereof not to permit the same nor any part, interest or title therein to pass to any other person whatever without the written consent of the party of the first part first had and obtained. [47]

And the party of the second part agrees to deliver up to the party of the first part upon the expiration of this lease the whole of the premises so owned by the party of the first part and all and every the appurtenances and improvements thereunto belonging.

And the party of the second part further specially agrees to make each and every cleanup in the presence of the party of the first part or his agent and to give due notice thereof.

And the said party of the second part further agrees to pay to the party of the first part as his share or royalty, in consideration of this demise twenty-five per cent of all the gold, gold dust and other mineral extracted, mined, taken and produced from the said ground during the term of this lease or lay and will pay the same to the party of the first part immediately after each cleanup, provided, that if the party of the second part shall comply with his part of the agreement herein and sink the said hole to bedrock as provided herein the party of the first part will convey the said one-fourth interest to him and then the said party of the second part shall only pay to the party of the first part twenty-five per cent of three-fourths of said output.

It is further agreed that the party of the second part shall and will furnish all the necessary tools, provisions, labor and outfit for the proper working of the said demised premises, during the whole of the term without any expense whatever to the party of the first part.

And it is further agreed by the party of the second part that he will immediately upon locating pay thereon put such a force of men and machinery at work thereon as is necessary to work the same in a good and workmanlike manner and will continue to work the same from that time until the end of the term of this lease.

And it is further agreed by the party of the second part that if he shall fail, refuse, or neglect to continue his work on the said ground for as much as sixty days at any time then this lease may be de-

clared to be at an end by the party of the first part who may thereupon enter upon the said premises and remove all persons therefrom and take exclusive possession thereof.

And finally upon the violation or failure by the said party of the second part or any person or persons under him, of any of the terms, covenants and conditions herein prescribed, the term of this lease or lay shall, at the option of the party of the first part expire and the said premises and every part thereof, with the appurtenances and improvements, save the personal property belonging to the party of the second part shall become forfeited to the party of the first part and he may with or without demand enter upon said premises and dispossess any and all persons occupying the same with or without force and with or without process of law. Each and every clause, covenant, term and condition of this agreement shall extend to the heirs, executors and administrators of the parties hereto and to the assigns of either. [48]

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

JAMES WICKERSHAM. (Seal)

H. J. PATTERSON. (Seal)

In the presence of

HENRY RODEN.

Territory of Alaska,  
Fairbanks Precinct,—ss.

This is to certify that on this 19 day of September, 1910, before me, a notary public in and for the Ter-



ritory of Alaska, residing therein, duly commissioned and sworn, personally appeared James Wickersham and H. J. Patterson, to me known to be the individuals described in and who executed the within lease or lay agreement, and they and each of them, each for himself and not one for the other acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year in this instrument first above written.

[Notarial Seal]

HENRY RODEN,

Notary Public in and for Alaska.

(Indorsed: 34,520. Entered. Compared. Agreement Between James Wickesham and H. J. Patterson, Dated September 19, 1910, Territory of Alaska, Fourth Judicial Division, ss. Filed for Record at request of H. J. Patterson on the 14 day of Aug., 1911, at 15 min. past 3 P. M., and Recorded in Vol. 5 of Miscel., page 255, Fairbanks Recording District. John F. Dillon, Recorder.) [49]

Upon plaintiff's offer the following agreement between James Wickersham and H. J. Patterson, dated October 12, 1911, was admitted in evidence and marked Plaintiff's Exhibit "B."

**Plaintiff's Exhibit "B"—Lease, October 12, 1911,  
Between James Wickersham and H. J. Patterson.**

#### LEASE OF MINING GROUND.

This indenture of lease made and entered into this 12th day of October, 1911, by and between James



Wickersham, of Fairbanks, Alaska, the party of the first part, and H. J. Patterson, of the same place, the party of the second part,

Witnesseth: That the party of the first part is the owner of an undivided three-fourths interest in and the party of the second part is the owner of an undivided one-fourth interest in that certain placer mining claim known as the "Daly Bench," situate on the left limit of Ester Creek in the second tier of benches and about opposite three below discovery on the left limit of said Ester Creek, Fairbanks Precinct, Alaska, and adjoining the Norton bench, which said Daly Bench was located by Pat Daly on December 1, 1905, the location notice of which is recorded at page 137, Vol. 7 of Locations, in the office of the recorder in said Fairbanks Precinct, Alaska; that the party of the second part has applied for and the party of the first part hereby gives to the party of the second part a lease upon the said claim in consideration of the terms and covenants of this lease and also in consideration of the terms and agreements contained in that certain other contract signed between these parties at the same time as this lease, which said other agreement is as much a part of this agreement of lease as if written in its body in consideration of the rents, royalties, covenants and agreements hereinafter reserved and by the said party of the second part to be kept, paid and performed, and in consideration of the performance of the other mentioned agreement, of even date herewith, the party of the first part does hereby grant, demise, let and lease unto the said party of the sec-

ond part, the party of the second part does hereby accept the lease of the whole of the said premises together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold-bearing placers therein contained subject to the terms of this agreement:

To have and to hold the same unto the said party of the second part from the date of this agreement until the 12th day of October, 1915, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rents and royalties agreed upon, or for other violation of the terms, covenants and conditions in this lease, or the agreement of even date herewith, against the said party of the second part reserved.

As part consideration of this lease the party of the second part agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall [50] at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease.

In consideration of the said demise and the lease the said party of the second part does hereby covenant and agree to and with the said party of the first part as follows, to wit: To enter upon the said demised premises within thirty days after the signing of these presents and begin and thereafter continuously maintain possession and mine the said mining claim in a good and miner-like manner with due regard to the development, preservation and value of the same as a mining claim, to leave all unworked ground intact and adjacent; to operate no rocker, long tom or other kindred machine except for prospecting; to do no panning thereon except to keep account of and test the value of the ground, and of such mineral obtained by rocker, longtom, panning or otherwise to keep accurate account and include the gross amount thereof in the gross output of gold produced from said premises; to work and mine said premises steadily and continuously from the date hereof until the termination of this lease; to well and sufficiently timber all shafts, drifts, tunnels and passageways where proper in accordance with good mining and not to mine, drift or excavate outside the boundaries of said demised premises, and should the party of the second part or anyone for or under him do so or otherwise interfere with other property then any damage resulting therefrom to any person shall be paid by the said party of the second part who shall save the party of the first part harmless; to excavate, mine and remove all pay dirt from the tunnels, drifts or other openings in said mine which

shall contain at least one dollar and a half to the square foot of bedrock.

And the party of the second part further agrees that immediately upon locating pay on said demised premises he will put such a sufficient force of men and machinery at work thereon as is necessary to work the same in a good and workmanlike manner and will continue to work the same from that time until the same is worked out; he agrees to furnish all the necessary tools, provisions, labor and outfit for the purpose of properly working the said premises during the whole of the term without any expense whatever to the party of the first part; and the party of the second part hereby expressly covenants and agrees that he will not allow or permit any lien or liens to be adjudged against the premises or upon the dump or gold or gold dust coming from the said premises, and the party of the second part will hold and keep the party of the first part and all his interest in the claim or output safe and harmless from any such liens for labor or otherwise, and the party of the second part agrees to post and maintain a notice in writing upon said premises in the name of the party of the first part giving notice to all persons, laborers, materialmen and others that no claim of lien shall be made thereon by any laborer, materialman or other person, in accordance with the statutes, and the party of the second part further agrees that his undivided one-fourth interest shall be held liable to the party of the first part for all liens or other [51] claims made or adjudged against said



property which shall in any way become a charge upon the interest of the party of the first part.

The party of the second part further agrees to permit the party of the first part or his agent at any time to enter into and upon all parts of the demised premises for the purpose of inspecting, testing, panning and determining the condition and value of the dirt in said ground, or to ascertain any other fact which in the discretion of the party of the first part or his agent is necessary and proper to his security, and will at all times permit the party of the first part or his agent to inspect the books, records and accounts, either in his books or in the bank, assay office or other place where the evidence and record can be found, and will permit the party of the first part or his agent to acquire in all proper ways and means any and all information regarding the business thereof or connected therewith.

The party of the second part agrees specially to make each and every cleanup in the presence of the party of the first part, or his duly authorized agent, and to give him or his agent reasonable advance notice so that he can be present and specially agrees to deliver to the party of the first part or to his duly authorized agent, the full twenty-five per cent or one-quarter of the gross amount of each and every cleanup at the time the same is finished, and it is agreed by the party of the first part that he or his duly authorized agent will at that time and place give to the party of the second part a receipt in writing for all such gold or gold dust so then received.

And it is of the essence of this contract, and the



party of the second part hereby specially agrees to pay and to deliver to the party of the first part, or to his duly authorized agent, in consideration of this lease, as the share, royalty and rental of the party of the first part twenty-five (25 per cent) per cent or a full one-fourth of the gross amount of all gold, gold dust and other mineral extracted, mined, taken or produced from the whole of the said premises during the whole of the term of this lease or lay, and agrees to pay and deliver said one-fourth part of the said gross output of the whole of the said mining claim to the said party of the first part or his duly authorized agent immediately upon and after each cleanup is so made, without delay or default for any reason whatever.

And the party of the second part does hereby specially agree not to assign this lease or lay or any interest therein or thereunder and not to sublet or sublease the said demised premises or any part thereof nor to permit the same nor any part thereof nor any interest therein to pass to any other person whatever without the written consent of the party of the first part had and obtained, and this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part.

The party of the second part further agrees that he will do the annual assessment work on said claim for the years 1911, 1912, 1913, 1914 and 1915, and that he will also make and file for record in the office of [52] the recorder in the precinct where said claim is located the proof thereof within the time limited

by law to secure the greatest legal advantage thereof to the owners of said claim.

The party of the second part agrees to deliver up to the party of the first part the whole of the premises belonging to the first *part*, or to his vendee, upon the expiration of this lease, and all the appurtenances and improvements thereunto belonging, free and clear of all incumbrances, liens, or taxes.

And it is further agreed by the party of the second part that if he or any person in possession through or under him, shall fail, neglect or refuse to work said ground continuously and in good faith for a period of more than sixty days, without the written consent of the party of the first part or his duly authorized agent, then and in that event the party of the first part, or his duly authorized agent may at his option declare the lease to be forfeited and at an end, and the party of the first part or his duly authorized agent, or his vendee may enter into possession thereof and remove all persons therefrom and take exclusive possession thereof.

And finally, upon the violation of any of the terms, covenants or conditions of this lease by the party of the second part, or by any person acting by, through or under him, through purpose, neglect or failure to fairly and promptly comply therewith as specifically herein written, the term of this lease or lay, at the option of the party of the first part, or his duly authorized agent, shall expire and be at an end, and the said premises with the appurtenances and all improvements thereon, save only the machinery and personal property belonging to the party of

the second part, or those acting within the terms of this lease by, through or under him, shall be immediately within the possession and under the control of the party of the first part or his duly authorized agent and the party of the first part or his duly authorized agent may with or without demand enter upon said premises and dispossess any and all persons occupying the same with or without force and with or without process of law.

Each and every clause, covenant, term and condition of this agreement shall extend to the heirs, executors or administrators of the parties hereto and to the assigns or vendees of either.

In witness whereof the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

JAMES WICKERSHAM. (Seal)

H. J. PATTERSON. (Seal)

In presence of

ALBERT R. HEILIG.

JOHN L. MCGINN. [53]

Territory of Alaska,  
Fairbanks Precinct,—ss.

This is to certify that on this 14th day of October, 1911, before me, the undersigned, a notary public in and for the Territory of Alaska, residing at Fairbanks therein, and being duly commissioned and sworn, there personally appeared James Wickersham and H. J. Patterson, to me known to be the individuals described in and who executed the within agreement and they each of them each for himself acknowledged to me that he signed and sealed the

same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and notarial seal the day and year in this certificate first above written.

[Notarial Seal]                      ALBERT R. HEILIG,  
Notary Public in and for the Territory of Alaska,  
Residing at Fairbanks Therein.

The share, royalty, or rental to be paid to the lessor by the lessee, under the terms of the hereto attached lease, is hereby reduced from twenty-five per cent to twenty per cent upon the gross output of the ground described in said lease; in all other respects the lease to remain in its original form.

Dated at Fairbanks, Alaska, January 29, 1912.

JAMES WICKERSHAM.

By HENRY T. RAY,  
His Atty. in Fact.

Witness:

ALBERT R. HEILIG.

Accepted.

(Indorsed: 35159. Entered. Compared. Agreement Between James Wickersham and H. J. Patterson. Dated October, 191. Territory of Alaska, Fourth Judicial Division, ss. Filed for Record at request of H. J. Patterson on the 10 day of Nov., 1911, at 50 min. past 10 A. M. and Recorded in Vol. 5 of Leases, page 216, Fairbanks Recording District. John F. Dillon, Recorder. By C. E. Wright, Deputy.) [54]



Upon plaintiff's offer the following agreement between James Wickersham and H. J. Patterson, dated October 12, 1911, was admitted in evidence and marked Plaintiff's Exhibit "C."

**Plaintiff's Exhibit "C"—Agreement, October 12, 1911, Between James Wickersham and H. J. Patterson.**

AGREEMENT.

THIS AGREEMENT made and entered into on this 12th day of October, 1911, by and between James Wickersham, of Fairbanks, Alaska, the party of the first part, and H. J. Patterson, of the same place, party of the second part.

WITNESSETH: That whereas the party of the first part has agreed with the party of the second part to lease to the party of the second part for a term of four years that certain placer mining claim situate in Fairbanks Precinct, Alaska, and particularly described as the Pat Daly Bench and being situate on the left limit of Esther creek, and being the second tier bench claim about opposit creek claim number three below discovery on said Ester Creek, and more particularly described in the lease made and signed by the parties hereto at the moment this agreement is also made and signed; and

Whereas the said lease agreement refers to another contract or agreement between these parties as a part of the contract of lease; Now, it is agreed between the parties hereto that this agreement is the agreement mentioned and referred to in the lease between these parties signed by these parties at the same time



this agreement is signed and we agree that the consideration between the parties in the lease is also the consideration for this agreement, and that this agreement shall, as between these parties, be taken and is a part of said lease agreement and shall be enforced under all the terms of the lease agreement as if it were written in the lease agreement.

It is agreed by the parties hereto, and the party of the second part herein agrees as a part of the consideration of the lease, that he will employ the attorney's Heilig and [55] McGinn, at his own expenses and costs, and that he will at his own expense and cost bring or defend all such suits in court or elsewhere as is necessary to protect and defend the Pat Daly location of the said placer mining claim, mentioned in this and the lease agreement, from all claims of every kind now made against the same in opposition to the right and title of the partes hereto, and specially from all claims of the Happy Home Association location which overlaps said claim, and the claims of some fraction located overlapping the same by other parties, all of which claims are subsequent to the location of the Pat Daly Bench made thereon on December 1, 1905; the party of the second part agrees to pay all the costs of such litigation in all courts and places, including witness' fees, attorney's fees, appeals and other proceedings until said conflicting claims are defeated and the title thereto is cleared from said claims and each of them. It is agreed that no part of the expense of any such litigation shall be paid by the party of the first part, and no part of his said property or the output thereof

shall be held liable therefor in any way whatever; although it is agreed that the party of the first part shall be, when necessary, a party to the said litigation; it is further agreed by the party of the first part that he will act as an attorney in aid of the parties hereto, in all such suits and proceedings, and that he will make no charge therefor so long as the party of the second part shall perform his part of this agreement, but it is expressly understood that the party of the first part shall not be required to give any time or attention thereto when it will conflict with his duties as Delegate in Congress from Alaska; it is also understood and agreed that the party of the first part shall always be consulted and advised with in respect to said suits and the character of the defense or attack which shall be made in the litigation, and that he will aid and [56] advise with the said attorneys as fully as his said duties will allow.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year in this agreement first above written.

JAMES WICKERSHAM.     [Seal]

H. J. PATTERSON.     [Seal]

In the presence of:

ALBERT R. HEILIG.

JOHN L. MCGINN.

Territory of Alaska,  
Fairbanks Precinct,—ss.

THIS IS TO CERTIFY that on this 14 day of October, 1911, at Fairbanks, Alaska, there personally appeared before me, the undersigned, a notary public

in and for the Territory of Alaska, residing at Fairbanks, therein, the above-named James Wickersham and H. J. Patterson, who are each personally known to me to be the persons who signed the foregoing agreement and who each acknowledged to me that he signed the same freely and voluntarily and for the uses and purposes therein set forth.

IN WITNESS WHEREOF I have hereunto set my hand and notarial seal the day and year in this certificate first above written.

[Seal] ALBERT R. HEILIG,  
Notary Public in and for the Territory of Alaska,  
Residing at Fairbanks, Alaska.

[Endorsed]: Agreement Between James Wickersham and H. J. Patterson. Dated October, 1911.  
[57]

Upon plaintiff's offer the following deed from James Wickersham to H. J. Patterson was admitted in evidence and marked Plaintiff's Exhibit "D."

**Plaintiff's Exhibit "D"—Deed, October 14, 1911,  
James Wickersham to H. J. Patterson.**

THIS INDENTURE made the 14th day of October, in the year of our Lord one thousand nine hundred and eleven, BETWEEN James Wickersham, the party of the first part, and H. J. Patterson, the party of the second part,

WITNESSETH That the said party of the first part, for and in consideration of the sum of One dollar lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged,

has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns.

An undivided one-quarter interest in and to that certain Bench placer mining claim situate in the Fairbanks precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly bench placer mining claim, and being the second bench claim on the left limit and about opposite of No. 3 creek claim below Discovery on said Ester Creek, and located by Pat Daly on December 1st, 1905.

Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States Statute.

TO HAVE AND TO HOLD all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES WICKERSHAM. [Seal]

Signed and executed in the presence of

ALBERT R. HEILIG.

C. E. WRIGHT.

United States of America,  
Territory of Alaska,—ss.

This is to certify: That on this 14th day of October, A. D. 1911, before me, the undersigned, a Notary



Public in and for the Territory of Alaska, duly commissioned and sworn, personally came James Wickersham, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Notarial Seal]                      ALBERT R. HEILIG,  
Notary Public in and for the Territory of Alaska,  
Residing at Fairbanks.    [58]

(Indorsed): 35158. Quitclaim Deed. From James Wickersham to H. J. Patterson. Dated ———, 19—. United States of America. Territory of Alaska, ss. Filed for Record at Request of H. J. Patterson on the 10 Day of Nov., 1911, at 45 Minutes Past 9 A. M. and Recorded in Volume 15 of Deeds, page 445. Records of Fairbanks Precinct, Territory of Alaska. John F. Dillon, Recorder. By C. E. Wright. [59]

Upon plaintiff's offer the following lease from H. J. Patterson to H. C. Hamilton was admitted in evidence and marked Plaintiff's Exhibit "E."

**Plaintiff's Exhibit "E"—Lease, November 27, 1911,  
Between H. J. Patterson and H. C. Hamilton.**

This indenture of lease made and entered into this 27th day of November, 1911, by and between H. J. Patterson of Fairbanks, Alaska, as party of the first part, and H. C. Hamilton of the same place, as party of the second part, witnesseth:



Whereas by indenture of lease dated October 12, 1911, James Wickersham did lease, let and demise unto the said H. J. Patterson that certain placer mining claim known as the "Daly Bench," situate on the left limit of Ester Creek, second pier, about opposite creek claim number three below discovery on said creek, in the Fairbanks Recording District, Alaska, for the term commencing October 12, 1911, and ending October 12, 1915;

And whereas said James Wickersham has consented to the subletting of said demised premises by the said H. J. Patterson to the said H. C. Hamilton upon the terms and conditions in said lease set forth;

Now therefore this indenture witnesseth that the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham and in his own right as owner of an undivided one-fourth part of the title to said mining claim, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915, upon the same terms, conditions and covenants and subject to the same terms and conditions as in said lease from James Wickersham to said H. J. Patterson set forth, excepting, however, that the said H. C. Hamilton, shall pay as royalty and rental as such lessee twenty-five per cent of the gross amount of each and every cleanup of gold and gold-dust made by him upon said demised premises to the said James Wickersham, and shall pay in addition thereto five

per cent of the gross amount of each and every cleanup of gold and gold-dust made by him upon said premises to the said H. J. Patterson, but in all other respects the terms, covenants and conditions of said lease from Wickersham to Patterson shall be binding upon the said H. C. Hamilton with the same force and effect and to all intents and purposes as if he were a party named as lessee in said lease.

And the said H. C. Hamilton hereby agrees to comply with and perform all the covenants and conditions in this lease contained and as well those contained in said lease from Wickersham to Patterson to the same extent and effect as if they were fully set out and repeated in this indenture, and to that end said lease and the terms, covenants and conditions therein referred to and hereby referred to and made a part of this lease.

In witness whereof the parties of the first and second part have hereunto set their hands and seals this 27th day of November, 1911.

H. J. PATTERSON. [Seal]

H. C. HAMILTON. [Seal]

In presence of

ALBERT R. HEILIG.

G. B. ERWIN. [60]

District of Alaska,

Fourth Division,—ss.

Before me the undersigned authority personally appeared H. J. Patterson and H. C. Hamilton, each of whom are personally known by me and known by me to be the individuals described in and who executed foregoing instrument, and each of them duly

acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and affixed my official seal at Fairbanks, Alaska, this 27th day of November, 1911.

[Notarial Seal]             ALBERT R. HEILIG,  
Notary Public, District of Alaska.

I hereby consent to the subletting of the mining ground described in the lease referred to.

JAMES WICKERSHAM.

By HENRY T. RAY,  
His Atty. in Fact. [61]

Upon plaintiff's offer the following deed from H. J. Patterson to Mariam A. Patterson was admitted in evidence and marked Plaintiff's Exhibit "F."

**Plaintiff's Exhibit "F"—Deed, November 27, 1911,  
H. J. Patterson to Mariam A. Patterson.**

THIS INDENTURE made and entered into this 27th day of November, A. D. 1911, by and between H. J. Patterson, of Fairbanks, Alaska, party of the first part, and Mariam A. Patterson, of the same place, party of the second part,

WITNESSETH: That the party of the first part, for and in consideration of the sum of One Dollar (\$1.00) lawful money of the United States of America, to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, hath, granted, bargained, and sold, conveyed, remised, released and quitclaimed, and by these presents doth grant, bargain, sell, convey, remise, release

and forever quitclaim unto the said party of the second part, her heirs and assigns, all his right, title and interest, being an undivided one-fourth interest of, in and to that certain bench placer mining claim situate in the Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly bench placer mining claim, being the second bench claim on the left limit and about opposite No. Three (3) creek claim below Discovery on said Ester Creek, and located by Pat Daly on December 1st, 1905;

TO HAVE AND TO HOLD the same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal this the day and year first above written.

H. J. PATTERSON. [Seal]

Signed, sealed and delivered in the presence of

G. B. ERWIN.

F. R. CLARK.

United States of America,  
Territory of Alaska,  
Fairbanks Precinct,—ss.

THIS IS TO CERTIFY that on this 27th day of November, A. D. 1911, before me, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally came H. J. Patterson, known to me to be the person described in and who executed the foregoing quitclaim deed, and who acknowledged to me that he executed and



[Seal]

A Notary Public in and for the Territory of Alaska.

JOHN F. DILLON.

Recorder.

By C. E. Wright,

Deputy. [62]

**Plaintiff's Exhibit "G"—Agreement, November 8, 1911, Between M. Wagner et al. and James Wickersham et al.**

THIS AGREEMENT made and entered into on the 8th day of November, A. D. 1911, by and between M. Wagner, C. Wichman, G. Wheeler, M. Beegler and E. M. Horner, parties of the first part, and James Wickersham and H. J. Patterson, parties of the second part, all of Fairbanks Precinct, Alaska,

WITNESSETH: That the parties of the first part did on or about June 6th, 1908, locate an association placer mining claim or sixty acres, or thereabouts, situate in the Fairbanks Mining District of Alaska, second tier bench off of Eva Creek opposite 2, 3 and 4 creek claims, to be known as the Happy Home Association, described as follows, to wit:



Commencing at this stake south east post and running 2600 feet in a northerly direction, then a thousand feet in a westerly direction, then 2600 feet in a southerly direction, then 1000 feet in an easterly direction to stake of beginning, joining second tier bench off of Ester Creek opposite 3 and 4 below left limit;

and the location certificate of which was filed for record Sept. 1, 1908, at 45 min. past 1 P. M., and recorded in the office of the recorder in said precinct on that day in Vol. 10 of locations notices and recorded at pages 174 and 175 therein; and subsequently the parties of the first part owners leased so much of said ground as is hereinafter described as overlapping the Pat Daly claim to E. M. Horner, lessee; that on the 1st day of December, 1905, Pat Daly located a placer claim in said Fairbanks Precinct on Ester Creek, a tributary of Cripple Creek, described as follows:

A second tier bench on left limit opposite No. 3 below Creek Claim, calls for 600 feet upstream or west and 400 feet downstream or east from the initial post and 872 feet back or north from lower right limit corner, thence 1000 feet upstream to upper left limit corner, and thence 872 feet back to upper left limit corner;

that stakes were set to mark the boundaries of said claim but were not exactly the distances mentioned in the notice; that discovery and assessment work were done on said claim, and the location notice was filed for record in the office of [63] the recorder in said district on February 21st, 1906, and same recorded in

Vol. 7 of Locations notices page 137; that thereafter the title to said premises was conveyed to and the same is now in the names of the parties of the second part, as owners and lessees; that the claim so located by the parties of the first part overlaps the claim so located for and owned by the parties of the second part as shown on that map of the survey thereof made by C. E. Davidson on the 29th day of September, 1911. That the parties hereto have compromised their differences in respect to the said overlap of the Daly Claim by the Happy Home Association claim, and in consideration thereof the parties of the first part do hereby abandon all right, claim, or title to the whole of the said Pat Daly claim as surveyed and located on the ground from stake to stake by the said C. E. Davidson survey of said Sept. 29th, 1911, and in consideration of the conveyance to them of the seventy-five feet strip hereinafter made by the parties of the second part to the parties of the first part, the parties of the first part do hereby sell, assign, set over and quitclaim to the parties of the second part, in the proportions as they now claim the same, the whole of the ground within the said Pat Daly claim as shown in said C. E. Davidson survey of said Sept. 29th, 1911; and in consideration of such conveyance to them the parties of the second part do hereby sell, assign, set over and quitclaim to the parties of the first part, in the proportions as they now claim the same, a strip of ground off the upper end of the Pat Daly claim, running up and down the general course of Ester Creek, and running seventy-five feet wide parallel to the northerly line of said

claim as shown on the C. E. Davidson survey of said Sept. 29th, 1911, the same to be surveyed and marked off by said Davidson as soon as he can hereafter do the work; the parties of the second part agree that the parties of the first part may permit the water and tailings from the said seventy-five foot strip and the land immediately adjacent and above where said E. M. Horner is now working [64] to flow upon the said Daly claim, but the parties of the first part and their lessees will impound the said tailings with brush and other material so as to pile the same in a good and workmanlike manner on their own ground and as little as practicable on the ground belonging to the parties of the second part. Water reaching the ground of the parties of the second part may be used by them in mining.

IN WITNESS WHEREOF the parties hereto have set their hands and seals at Fairbanks, Alaska, on the day and year first above written.

M. WAGNER,  
CHRIS WICHMAN,  
GEO. WHEELER,  
M. BEEGLER by WHEELER,  
E. M. HORNER & CO.,

Per E. J. HORNER,

Parties of the First Part.

JAMES WICKERSHAM,  
H. J. PATTERSON,

Parties of the Second Part.

Witnesses:

C. E. DAVIDSON,  
J. E. COFFER.

Territory of Alaska,  
Fairbanks Precinct,—ss.

This is to certify: That on this 8th day of November, A. D. 1911, there personally appeared before me, the undersigned notary public, the above-named persons, who are each known to me to be the persons who signed the foregoing instrument and who each signed the same in my presence and who each acknowledged to me that he signed the same freely and voluntarily and for the uses and purposes therein set forth.

IN WITNESS WHEREOF I have hereunto set my hand and notarial seal on the day and date in this certificate first above written.

[Notarial Seal]                      JOHN E. COFFER,  
Notary Public in and for the Territory of Alaska,  
Residing at Fairbanks, Alaska. [65]

[Indorsed]: 35160    Entered, compared, indexed.  
Dated November 8th, 1911.    M. Wagner et al. and  
James Wickersham et al.

Deed. (Note: Words “compromise agreement” marked out in pencil and word “Deed” written above same in pencil.)

Territory of Alaska,  
Fourth Judicial Division,—ss.

Filed for record at request of H. J. Patterson on the 10 day of Nov., 1911, at 10 A. M., and recorded in

Vol. 15 Deeds, page 446, Fairbanks Recording Precinct.

JOHN F. DILLON,  
Recorder,  
By C. E. Wright,  
Deputy.

Upon defendants' offer the following note was admitted in evidence and marked Defendants' Exhibit 1.

**Defendants' Exhibit 1—Note, October 19, 1905, H. J.**

**Patterson et al. to Mrs. H. J. Patterson.**

\$500.00

Dawson, Y. T., Oct. 19, 1905.

Nine months after date we promise to pay to Mrs. H. J. Patterson Five hundred and 00-100 dollars. Value received, at the rate of 2 per cent per month.

Due July 19, 1906.

H. J. PATTERSON,  
D. G. HOSLER. [66]

Upon defendants' offer a pass-book issued by the Bank of British North America to Mariam A. Patterson was admitted in evidence and marked Defendants' Exhibit 2, of which the following is a copy:



**Defendants' Exhibit 2—Pass-book, Bank of British  
North America to Mariam A. Patterson.**

THE BANK OF BRITISH NORTH AMERICA.  
In Account with Mrs. H. J. PATTERSON.

Date.	Particulars.	Dr. Cheques.	Cr. Deposits.	Dr. or Cr. Balance.	Ledger Keeper's Initials.
1905.					
Sep 2,	Dep		300.	Cr. 300.	A M
11,	c		850.	1150.	A M
21,	c		350.	1500.	A M
Oct 2,	c		443.	1943.	A M
		200.			
		300.			
		250.			
		50.		1143.	
		180.		963.	A M
		15.75			
		75.			
		200.			
		7.50			
		50.			
		10.			
		50.			
		200.		354.75	A M
		25.		329.75	A M
		8.50			
		35.			
		38.75			
		31.55			
		25.		190.95	A M
		10.		180.95	A M

Upon defendants' offer a pass-book issued by the Washington-Alaska Bank to Mariam A. Patterson was admitted in evidence and marked Defendants' Exhibit 3, of which the following is a copy:

**Defendants' Exhibit 3—Pass-book, Washington-Alaska Bank to Mariam A. Patterson.**

**WASHINGTON-ALASKA BANK.**

In account with Mrs. MARIAM A. PATTERSON.

Dr.	Deposits.	Checks.	Cr.
1910		Checks as per list	
Aug. 11.	300.00	4 vouchers Ret'd 315.	
15.	475.98	Balance,	460.98
	<hr/>		<hr/>
	775.98		775.98
	<hr/>		<hr/>
	<hr/>	Checks as per list	
1910		8 vouchers Ret'd 320.25	
Nov. 9, Balance,	460.98	Balance,	140.73
	<hr/>		<hr/>
	460.98		460.98
	<hr/>		<hr/>
	<hr/>		

1911

Jan. 4, Balance, 140.73

Upon defendants' offer the following check was admitted in evidence and marked Defendants' Exhibit 4.

**Defendants' Exhibit 4—Check, September 21, 1910,  
Mariam A. Patterson to Fred Craig.**

Fairbanks, Alaska, Sept. 21, 1910.

WASHINGTON-ALASKA BANK.

Pay to the order of Fred Craig, \$225.00, Two hundred and twenty-five 00-100 Dollars.

MARIAM A. PATTERSON.

Which check is indorsed with the name "Fred Craig" and the name "Fairbanks Banking Co.," and has perforations thereon reading, "Paid 9-23-10."  
[68]

**Testimony of H. J. Patterson, for Plaintiff.**

Plaintiff called the defendant, H. J. PATTERSON as a witness, who being duly sworn testified as follows:

On the 27th day of November, 1911, I made the deed marked Plaintiff's Exhibit "F"; my books at that time showed me to be indebted about \$32,000. It would be pretty hard to get an accurate value of my property at that time; I had the property listed in the bankruptcy schedules and the lease on the Last Chance Association; the latter had a market value at that time; the lease was assigned about ten days afterwards; a receiver has been appointed just before the execution of the deed and before I assigned the lease to the men. We had tried almost every means by which work under the lease could be carried on, without success, and finally a proposition came up that 25 of the laborers were willing to take over the proposition. Some of the creditors were willing to furnish supplies to these laborers and the owners of the mining claim were also willing

(Testimony of H. J. Patterson.)

to raise money to pay off some of the laborers that were not going into the proposition, and they paid them off at fifty cents on the dollar. The 25 laborers undertook to operate the mining claim under my lease but they made a miserable failure of it.

**Testimony of E. R. Peoples, for Plaintiff.**

Plaintiff thereupon called E. R. PEOPLES as a witness, who testified as follows:

I am a merchant in Fairbanks, acquainted with H. J. Patterson, and knew him on November 27, 1911; I was furnishing him general supplies while he was conducting his mining operations on Last Chance Association claim on Engineer creek; in the latter part of November, 1911 he owed me approximately \$4000. I knew J. Stocker; he was boarding H. J. Patterson's men under a contract with him; he is in Juneau now. I furnished supplies to Stocker, groceries, etc. I was at a meeting of creditors of H. J. Patterson in the latter part of November, 1911, in McGowan & Clark's office, which Mr. Patterson attended, at which his affairs and the amount of his indebtedness was discussed; he stated at the time that he couldn't take up the bills and continue working without assistance and it was apparent that the labor was bothering him for money and they were trying to perfect arrangements with the owners and the laborers whereby they [69] would take it over and continue to work it; the lay was to be out of Mr. Patterson's hands. I have never been able to collect my money from Mr. Patterson. There was a suit instituted in my name for

(Testimony of E. R. Peoples.)

the appointment of a receiver on that lease; Mr. Patterson assigned the lease to the laborers. At that meeting in McGowan & Clark's office Mr. Patterson stated that he didn't have the money to pay his men and that he couldn't keep them unless he was able to pay them.

#### On Cross-examination.

When I said I have never been able to collect my money from Mr. Patterson I meant the balance still due me; he made a few payments on account. There was a check for \$1,000 that he gave me which was not paid; I presented it to the bank and it refused payment, not sufficient funds; my confidence in Mr. Patterson was very much shaken by his failure to carry out his promises regarding payments on his account so my instructions were to get the check to the bank as soon as possible before other checks were got in. I was aware that the only means Mr. Patterson had at that time with which to pay these checks was the output of this Last Chance claim, and I felt from the amount of money we were receiving and the amount of supplies that were going to the claim that we were not receiving anywhere near what we should. Up to the time Mr. Patterson ceased these mining operations I received \$2,000 from him; however, in the meantime Mr. Patterson was making payments to me on Stocker's account. From October 18 to November 9, 1911, he paid me a total on both accounts of \$3,250. Stocker was a part owner of the Last Chance association.



(Testimony of E. R. Peoples.)

**On Redirect Examination.**

About a week after the \$1000 check was received and turned down I had a conference with Mr. Patterson at my office; I asked him for security on the Esther property; I received the check on November 15; I knew then that Judge Wickersham had deeded a quarter interest in the Daly Bench on Eva creek to Mr. Patterson; before that deed was recorded I knew Mr. Patterson had some interest there but didn't know just what interest it was. Mr. Patterson stated that through an arrangement with Mr. Wickersham he was unable to [70] incumber the property in any way; that he had an agreement to that effect with him; I told him I knew, according to the records, that there was an interest in there; that he had a quarter.

At the time of the conference in McGowan & Clark's office the ground (Last Chance Association) was considered fair ground, good ground, but hard to work; we were not satisfied with Mr. Patterson's working.

**Testimony of A. Bruning, for Plaintiff.**

Plaintiff thereupon called A. BRUNING, as a witness, who testified as follows:

I am, and on November 27, 1911, was, cashier of the American Bank of Alaska. On that day I think Mr. Patterson was indebted to me as an individual; I believe he gave me a note; it seems to me it was for \$2,910. I am not quite sure now. He was indebted to the bank at that time on a note for \$2,089.57 and an overdraft of \$2,935.35. On Decem-

(Testimony of A. Bruning.)

ber 1, 1911, we credited his account with \$13.40; the balance was never paid. I don't think he was able on November 27, 1911, to pay what he owed me individually or to the bank, or he would have paid. I knew he had been mining on Last Chance. He gave the bank his note for \$1,408.30, which covered only a part of the overdraft; it is my recollection that this amount represented checks that had been drawn on the account for the purpose of paying some bills for property on Esther creek. He looked over his checks and made a list of them and said this was in payment of work that had been performed on Esther creek; I think he referred to a claim on Eva creek; he gave me a note for the part that had gone unto that claim on Esther creek.

#### On Cross-examination.

This first note of \$2,089.50 was given for a debt incurred by Mr. Patterson's operations on Esther creek in 1910, I think, when he was a partner with Tolbert on the Tolbert Bench; apparently the balance due the bank of \$1,513.65 that was not covered by the note of \$1,408.30. I should judge would be a debt incurred by him on Esther creek, as he made a segregation at his own suggestion. He was in partnership with Tolbert on Esther creek; if it was the Tolbert bench I don't know. It was in [71] 1910. My arrangement with Mr. Patterson was that if I gave him,—advanced him the money so he could get the shaft down to bedrock in his mining operations on Engineer creek, and begin to take out money, that I should get my money back first.

**Testimony of Edward Stroecker, in His Own Behalf.**

Plaintiff, EDWARD STROECKER, testified as follows:

In the year 1911 I was in the employ of Mr. Peoples; I knew Joe Stocker during that time; during that time Patterson was working on the Last Chance Association, I was endeavoring to collect money from Patterson and Stocker for Peoples. Stocker was running his own mess-house out there. I noticed in the paper or ascertained that James Wickersham had executed a deed to Mr. H. J. Patterson covering a quarter interest in the Daly Bench on Esther or Eva creek, I immediately told Mr. Peoples; subsequent to that time and before November 27, 1911, Mr. Patterson was in Peoples' office; it was on a Saturday preceding the Monday when the transfer was made; I saw a notice of the deed in the paper; when Patterson came in he went into the private office with Mr. Peoples and I immediately went to look up the records in the recorder's office and took a memorandum of the deed from Wickersham to Patterson, made a complete copy of it and I called him out of the private office and gave him this memorandum, gave it to Peoples, I think it was about Tuesday morning after that that I saw a notice in the paper stating that Mr. Patterson had transferred this same property to his wife.

Q. And how frequently, if at all, did you interview Mr. Patterson during the month of November relative to securing payment of the Peoples' account, or payments on the Peoples' account?

(Testimony of Edward Stroecker.)

A. We were after him rather strong, because it was getting late in the season and we knew about how the developments were going on. My partner was working out there and at [72] times I used to hear from him, and kept pretty fair track of it, and I knew that things were not just going right. He was thinking of quitting because he was afraid of a failure.

**Testimony of John S. Junkin, for Plaintiff.**

Thereupon plaintiff called JOHN S. JUNKIN as a witness, who testified as follows:

I became acquainted with H. J. Patterson in 1906 or '7; I am a machinist and engineer; I worked for Patterson on Ready Bullion creek and on Esther creek for Patterson & Tolbert and on Engineer creek on the Last Chance Association; at the last place I worked from February to the latter part of November, 1911, until he closed down; I saw Mr. Peoples out there in the latter part of October or early in November, 1911. Patterson told me Peoples was pressing him [73] for money; he said if they were squeezing him too hard that he would put the Eva creek property in his wife's name and let the creditors do what they wished about it, or something to that effect. And I asked him where the men were going to get off for their wages and he said he would see that all of the workmen got their wages if it took every cent that came out of the Eva creek property. I asked him why he didn't have it in his wife's name if he was afraid of it, and he said it would injure his credit still further if he



(Testimony of John S. Junkin.)

had; he told me that he had a fourth interest in the Daly Bench, also a seventy-five per cent lay on the whole claim, the Daly Bench on Eva creek, at the mouth of Eva; I think this was in the early part of November, 1911.

On Cross-examination.

He told me all the time that he owned a quarter interest in the Daly bench; said he got it for putting a hole to bedrock from James Wickersham; he didn't tell me he had a deed for it; he told me that in addition to the quarter interest he also had a 75 per cent lay on the whole claim; at one time he had promised me an interest in the lay but I didn't get it. I assigned my account to one of the claim owners and got my money. Mrs. Patterson was present at one time when he told me he had got a quarter interest in the bench for putting down a hole; that was in a cabin on Esther creek; she didn't say anything at all about it that I remember; he was talking something about going to put a working shaft upon it and seeing what was in it; he told me he had a lay on it; this was the night that Patterson and Tolbert had shut down; we were up in his cabin getting settled up for the work we had done on the Tolbert Bench, shortly before Christmas in 1910.

On Redirect Examination.

This conversation was in Mr. Patterson's cabin on Esther creek about 8 o'clock P. M. the night he shut down work on the Tolbert Bench; Mr. and Mrs. Patterson, an engineer named Mosier, and I think Mr. Tolbert and myself were present; Mosier asked



(Testimony of John S. Junkin.)

Mr. Patterson what they were going to do now, and Mr. Patterson said he was thinking of putting a working shaft down on his Eva creek property, and then he [74] told me about getting the quarter interest from Wickersham in the Daly bench; he said it lay right back over the hill here on the mouth of Eva creek; he pointed with his thumb toward Eva creek, where Eva creek ran into Esther. Mrs Patterson was sitting right there and heard what he said.

**Testimony of H. J. Patterson in His Own Behalf.**

Thereupon defendants called H. J. PATTERSON, one of the defendants, as a witness, who testified as follows:

I was married to Mariam A. Patterson, my co-defendant, on June 3, 1896; we lived together in the Yukon territory from 1901 or '2 until 1906, when we made a trip outside; we came to Fairbanks in the fall of 1907; during the year 1905 Mrs. Patterson was the owner of a placer mining claim in the Yukon Territory; it was a fraction between 45 and 46 Below Discovery on Bonanza creek; she acquired that property by staking under the ordinary laws. I saw her stake it; she wrote the location notice and signed it in the manner which was customary in that country; she staked other property besides. [75] She recorded the fraction on Bonanza creek in her name. The claim was staked by Mrs. Patterson in the customary way in which mining claims were staked there. After she had staked and recorded the claim she leased it to D. G. Hosler, a witness in

(Testimony of H. J. Patterson.)

this case, on a 65 or 70 per cent lay, the balance to the owner as royalty. I was interested with Hosler in actual mining on the fraction. Mr. Hosler paid to Mrs. Patterson about \$2,100 in royalties, on the proceeds of his mining operations on the fraction. She deposited the gold-dust she received as royalty in the Bank of British North America in Dawson. I have seen her pass-book. (Book handed witness.) This is the pass-book she received from that Bank in which Bank credited her deposits.

(Defendants offer pass-book in evidence. Admitted and marked Defendants' Exhibit 2.)

The pass-book shows that from September 2 to October 2, 1905, both dates included, Mrs. Patterson deposited in that bank \$1,943 as royalties received by her. I regarded this money, these royalties, as her own separate property at the time. Subsequently Mr. Hosler and I borrowed \$500 from Mrs. Patterson on one occasion and some more later on. In the Spring of 1906 we repaid to her all we had borrowed excepting the \$500; for that we gave her our note. (Paper marked Defendants' Exhibit 1 handed witness.) This is the note we gave her. Afterwards we paid this note to her, with part of the interest it calls for. We paid her \$600 altogether. At or about that time Mrs. Patterson received other moneys from Hosler. I deposited these moneys that she received on the note and from Hosler for her and to her account in the Washington-Alaska Bank. (Book shown witness marked Defendants' Exhibit 3.) This is the bank-book is-

(Testimony of H. J. Patterson.)

sued by that bank when this deposit was made to her account and is issued by the Washington-Alaska Bank of Fairbanks, Alaska, in account with Mrs. Mariam A. Patterson. Mr. Hosler and I operated a placer mine on Ready Bullion Creek in 1909 and 1910; our operations were profitable, and with our profits therein we paid off that note. [76] At that time I had money on deposit in the American Bank of Alaska and didn't owe anything. This money which I deposited to the credit of Mrs. Patterson I considered her property. Her deposits were made on August 11 and 15, 1910, and amounted to \$775.98.

About two years before that I had mined near the Daly Bench claim and got the idea that some day I would do some prospecting up that way; I had the use of a hundred horse-power mining plant, so I went to see Judge Wickersham about the Daly Bench; no holes had been sunk to bedrock on that claim at that time, and it was an unknown quantity; nothing had been found on it. I asked Wickersham for a half interest and a lay on the claim; he refused but offered me a quarter interest and a 75% lay on the whole claim; we agreed on that proposition and he told his stenographer to make out the papers. I went home that night and told Mrs. Patterson about my conference with Wickersham and his proposition. Then I made the proposition to her that if she wanted to pay for the sinking of the drill hole, or the hole to bedrock, that she could have the quarter interest; if we struck pay I would need all the money I had to open up the ground; and she was willing to take

(Testimony of H. J. Patterson.)

the chance. So I went immediately and made arrangements with the drill-men and took Mr. Craig up on to the ground and showed him where I thought was the most likely place to sink the hole. I then went to Fairbanks and signed up the papers with Judge Wickersham for the quarter interest and the lease. (Document marked Plaintiff Exhibit "A" shown witness.) This is the agreement that I entered into with Wickersham. I made an agreement with my wife that if she would at her own expense have this work done which was required under the agreement with Wickersham in order to secure that quarter interest in the Daly Bench that the title to the quarter interest when received from Wickersham should be vested in her. When I came back from Fairbanks the drill-men already had one hole to what they thought was bedrock; I didn't think so; so we moved over 200 feet further and sank another hole with the knowledge and agreement of Mrs. Patterson and at her expense; she paid for these two holes by her check. (Check on Washington-Alaska Bank, dated September 1, 1910, to the order of [77] Fred Craig for \$225 shown witness.) This is the check I gave to Fred Craig, with Mrs. Patterson's signature to it for the sinking of those holes to bedrock. This \$225 was in no sense a loan of money to me. I never repaid it nor any part of it to her. After Mrs. Patterson had paid the purchase price of this quarter interest I always thereafter considered it to be her property. After this work was performed I came to Fairbanks and found Wickersham had gone to



(Testimony of H. J. Patterson.)

Washington as delegate from Alaska. He returned to Fairbanks some time in 1911 by boat. I did nothing under the lease part of the agreement with the result that Wickersham forfeited the lease, in the Summer of 1911. I then secured a new lease but had to consent to a great many things before I got it. I considered a 75% lay on the ground very much more valuable than a quarter interest in the property; I was particularly concerned about the lease on the property. Afterwards I was out on the claim with Wickersham and showed him the deepest drill hole and the drill cuttings to satisfy him that that hole went to bedrock. He told me, "You have forfeited your lease but I will give you the quarter interest any time, but if you get the new lease you will have to undertake certain obligations"; those obligations are set forth in the lease of October 12, 1911, and the auxiliary agreement made at the time, the papers already in evidence marked Plaintiff's Exhibit "B" and Plaintiff's Exhibit "C." The writing attached to the front page of the lease, dated January 29, 1912, signed "James Wickersham by Henry T. Ray, his Atty. in Fact," was not a part of the lease when it was executed.

(Plaintiff here admitted Henry T. Ray's authority to execute the writing.)

Instead of going to work under the lease of September 19, 1910, I mined on the Tolbert Bench; I commenced there, I think, on Nov. 2, 1910; I rented a mining plant; at that time I had a few hundred dollars in bank and owed nothing. We mined on



(Testimony of H. J. Patterson.)

the Tolbert Bench about six weeks, and then abandoned it. After that I commenced mining on the Last Chance Association on Engineer creek. I had no money but I made arrangements to raise some, and was offered supplies [78] by Peoples and machinery by Brumbaugh & Hamilton. I had an arrangement with Mr. Bruning, cashier of the American Bank of Alaska, under which he honored my checks until the first cleanup. I deposited my cleanups in that bank, [that is the total output less the royalty paid to the owners. During November, 1911, I deposited in that bank a total of \$21,293.89, the last deposit in that month being on November 27, amounting to \$5,533. During that month as near as I could estimate I was clearing from one hundred to two hundred dollars a day. It was my belief then that if I carried on my mining operations in continuation of what I had already done that the thing could be pulled out clear of everything and possibly a nice profit. I ceased operations on Last Chance Association because Mr. Bruning seized the last cleanup of \$5,533 deposited on November 27, and applied it to an overdraft and turned down all the checks that I had issued against it and refused to honor any checks further. I executed the deed to my wife before I had learned that the bank had appropriated all of the last cleanup.

After Wickersham got back to Fairbanks in the fall of 1911 I went to see him for the purpose of getting the deed to the quarter interest and to get a new lease. I asked him to make the deed to Mrs.

(Testimony of H. J. Patterson.)

Patterson, because, as I told him, she had paid for sinking the drill holes. He didn't do that and stated as his reason, "I don't want to mix things up. I want to do business with you. I will give you the deed and you can make the deed to whoever you like." I did not do any mining myself on the Daly Bench in 1911, under the Wickersham lease; there was a controversy over the title to most of that claim, which was compromised, and I had all I could possibly handle at that time on Engineer creek. So I transferred or assigned the lease to Henry C. Hamilton. I received nothing for the assignment of that lease except a promise. Hamilton subleased to the Smith Brothers the upper 250 feet and afterwards went in as a partner with them in working it. He also worked the next, the middle 300 feet. At no time did I receive anything from Hamilton as the proceeds of mining operations carried on by himself or with the Smith [79] Brothers, and I never demanded any part of the proceeds of the royalty when Mr. Hamilton was called upon to pay. Under the assignment of lease which I made to Hamilton there was a provision that he should pay as royalty to Wickersham twenty-five per cent of the gross output, but there was never any understanding or agreement with him that I was to receive any part of that royalty. Afterwards the amount that was to accrue to Wickersham under his lease was reduced by Wickersham to twenty per cent. This reduction was made by him on January 29, 1912, and was made because there had not anything been struck on the

(Testimony of H. J. Patterson.)

ground at the time, no pay struck on the ground at the time. Up to that time the laymen had put a working shaft to bedrock and drifted 117 feet one way and 40 or 50 feet the other. I think it was a week or ten days after January 29, 1912, that pay was struck on the Daly Bench. I never received any of the five per cent royalty which was reserved to me under this lease to Hamilton. My understanding was that that five per cent was to go to the quarter interest that Wickersham gave to me. The first cleanup of gold made on that ground was in May, 1912, after the water began running. Prior to that time no royalty had accrued under the lease. At the first cleanup Henry T. Ray was present, representing Wickersham; Mr. Hamilton, and Mrs. Patterson and I were also present. Mrs. Patterson then demanded her share of the cleanup, her royalty, five per cent upon the ground that she was the owner of the quarter interest. She did not receive it. Mr. Hamilton said that Mr. Clark had told him there were proceedings started for an injunction and that he didn't feel like that he could give it; and the Smith Brothers they were going to give it to her anyway; and I was afraid of complications and I didn't want to get the others in wrong, and I asked Mr. Hamilton to telephone Mr. Heilig and find out; and he telephoned to Mr. Heilig and told me that Mr. Heilig said there was an injunction against her receiving any money or any royalty. No injunction papers had been served on Mrs. Patterson, nor on Mr. Hamilton at that time.

(Testimony of H. J. Patterson.)

Mr. Heilig here stated that the order had been made while he [80] was present in court as attorney for defendants.

At that cleanup I did not demand any part of the royalty nor at any other cleanup. I did not consider myself entitled to any part of the royalty at any of the cleanups. After I received the deed for the quarter interest from Wickersham I told my wife that he had made the deed to me and that I was very much disappointed the way the thing had to be done and everything, and tried to explain it to her the best I could. I told her I would make a deed to her the next time I went to town. The deed from Wickersham to me was not delivered to me by him until after the settlement of the controversy regarding the title to the ground; and on the 10th of November, 1911, after it was settled, Wickersham and I went to the recorder's office and recorded the agreement settling the controversy regarding the title, and the lease to me and the deed to me. I paid for the recording. Prior to that time I didn't have the deed. On the 27th day of November, 1911, I executed a conveyance of this quarter interest to my wife.

Q. State why you didn't convey it any sooner after you had got the deed.

A. Well, I was only in town I think once with a cleanup between that time, and I was so very busy that I didn't simply get around to it. And I was also dealing with Mr. Hamilton in regard to taking him in with me on the lease on Last Chance, giving him a half interest in the lease on Last Chance and



(Testimony of H. J. Patterson.)

a half interest in the lease on the Daly Bench, and it was the second cleanup from the time the deed was made that I made an appointment—Mr. Hamilton was very busy. He was working on Little Eldorado at the time. I made an appointment, and he came in, and we went over and looked at the Daly Bench property, and when he refused to go in on the Engineer property, then I gave him a [81] lease. He came in that evening and I was in a hurry to get back to my work on Engineer, because I had been away all day. I came to Mr. Heilig's office and asked Mr. Heilig to make a lease to Mr. Hamilton. I walked in to Guy Erwin's office next door, and asked him to make a deed, and left the deed with Guy Erwin to be recorded. I was anxious to get out to Engineer as soon as possible.

Q. You executed this deed, Plaintiff's Exhibit "F"? (Hands same to witness.)

A. Yes, sir.

Q. After you had executed it, you delivered it to Guy Erwin, with instructions to have it recorded?

A. Yes. With instructions to have it recorded.

Q. I will ask you to state whether you intended at that time to surrender and did surrender all control of the quarter interest to your wife. A. Yes, sir.

The deed was recorded on December 1st, and a day or two after it was recorded he gave it to me or sent it out to me and I gave it to Mrs. Patterson as soon as I got home. At the time I made the deed to Mrs. Patterson I did not have any intention to hinder, delay or defraud my creditors. I conveyed



(Testimony of H. J. Patterson.)

the legal title to this [82] property to my wife because I had promised to and because she had done the work, and she had asked me just a few days before. I refer to the original promise I had made her in the beginning that if she would pay for the sinking of the drill holes that I would deed her the quarter interest; that was in September, 1910, before the drill holes were sunk and the money paid. I never stated at any time in the presence and hearing of Mrs. Patterson that this quarter interest in the Daly Bench belonged to me; I did not state to John Junkin on the Tolbert Bench in the presence and hearing of Mrs. Patterson shortly after we quit work on the Tolbert Bench that I owned the quarter interest in the Daly Bench. I had a conversation with John Junkin on Engineer creek in regard to the lay. I never stated to John Junkin on Engineer creek that if my creditors continued to press me I would put my interest in the Daly Bench in my wife's name. At the time I got this second lease from Wickersham my wife and I were living on Engineer. Mrs. Patterson did not see any of the documents which were drawn up and signed by me and Wickersham with reference to the Daly Bench before they were executed. She did not see the lease that I made to Hamilton of the quarter interest before it was executed. I told her what I had done and she seemed to be very well satisfied with it. On two occasions I asked Wickersham to make this deed in Mrs. Patterson's name, the second occasion was when he came to make out the deed. I asked him to make the deed

(Testimony of H. J. Patterson.)

to her for she had paid for the sinking of the two holes. I received nothing from Mrs. Patterson at the time I made this deed to her, nor did at any time receive anything from her for this quarter interest. I never sold this quarter interest to her; I considered it merely a transfer; the consideration for the transfer to her of the legal title which stood in my name was because she had paid for the sinking of the drill holes. The paying of the expense of sinking the drill holes was what my agreement with Wickersham called for as the purchase price of the quarter interest, and it was upon that consideration that I agreed with my wife that if Wickersham made the deed in my name that I would transfer it directly to her. [83]

Cross-examination.

(By Mr. CLARK.)

Q. There was some question, Mr. Patterson, was there, as to whether the first hole went to bedrock?

A. Yes, sir.

Q. Between whom did that question or controversy arise? A. Between the drill men and I.

Q. When did it arise?

A. At the time of the sinking of it.

Q. When did you first discover it?

A. They had the hole down a hundred feet before I got up there, and it was out of proportion, and we had quite an argument over the fact that it was only 100 feet, and you couldn't be sure. I examined the cuttings, and so I asked them to move over and sink another hole.

(Testimony of H. J. Patterson.)

Q. The only reason you had them move to some other place was because that hole wasn't to bedrock?

A. Well, now, the real purpose—(interrupted).

Q. I am asking you if that was the reason for that. You have said that you examined the cuttings and it didn't look as though it was bedrock, and you had him move over. That was the only reason, was it, for having him move over; because of the fact that he hadn't reached bedrock?

A. The ground was soft, and they were afraid of sticking their drill, and they refused to go further in that hole.

Q. When did they refuse to go further?

A. That morning. [84]

Q. You didn't expect that you had to sink a hole to bedrock, and then go and do one hundred dollars worth of assessment work besides, did you?

A. I don't think so.

Q. You testified at the last trial, didn't you?

A. I did.

Q. You were under oath at that time, did you not?

A. Yes, sir.

Q. Was not this question asked you and this answer returned? (Reads:)

“Mr. HEILIG.—Q. I will ask this witness to state what Judge Wickersham said in regard to your right to the transfer of the quarter interest.

Mr. CLARK.—We object as hearsay.

The COURT.—He may answer, subject to the objection.

A. Wickersham agreed to make a deed to the

(Testimony of H. J. Patterson.)

quarter interest. But, so far as continuing the lay, he would not do it, because conditions had changed, and, before I could get a new lease from Wickersham, I had to assume a lot of extra heavy duties that didn't occur in the first lease. But, if I wanted to drop the lease altogether, he offered to deed to me the quarter interest.

Q. (By Mr. HEILIG.) I will ask you whether you recollect any statement on his part, that he admitted that you had performed the conditions of the transfer.

Mr. CLARK.—We object as hearsay and leading.

The COURT.—Do you (to Mr. Clark) contend that he had not?

Mr. HEILIG.—They are basing their title on that very fact.

The COURT.—Objection overruled.

A. At the time we surveyed the ground during—When Wickersham came in here, I took Wickersham to the ground and showed him the drill holes and showed him the bedrock that had been dumped out, and he was satisfied that those holes went to bedrock."

Did you at that time so testify, Mr. Patterson?

A. I believe I did. [85]

Q. Did you at that time also testify as follows? (Reads:)

"Q. You signed up what you called the agreement dated the 19th of September, 1910?

"A. Yes. And when I came back, he was down to bedrock in that first hole. He didn't find anything



(Testimony of H. J. Patterson.)

and Mr. Craig had had a good deal of experience in drilling claims on the creek up above, and we were talking about it and he suggested further over would be a better chance, and we went over to the left of the claim and started another hole, and that was put down 125 feet. The first one was 100 feet and the second one was 125 feet. They charged a dollar a foot."

Did you so answer to that?     A. I did.

Q. Did you at that time remember about not having reached bedrock in the first hole?

A. I remember there was a difference of opinion as to whether it was to bedrock.

Q. Did you so state in your testimony?

A. I did not.

Mr. CLARK.—Now, Mr. Patterson, when did it first occur to you that this first hole hadn't reached bedrock, that is, to testify to it? Have you ever heretofore in the trial of this case— On the first trial of this case did you at any time mention the fact that the first hole hadn't got to bedrock? [86]

A. I don't think I did. I am not sure.

Q. Now, since this other trial, you have read the brief, haven't you, that was prepared on behalf of the trustee Mr. Stroecker to send to the Circuit Court of Appeals?

A. I don't think—I don't know as I read it.

Q. You have discussed with Mr. Heilig the proposition that we made in this case, that the first one hundred dollars that was expended completed the work so far as the Wickersham agreement was con-



(Testimony of H. J. Patterson.)

cerned? You have discussed that with him, haven't you? A. I don't think so.

Q. Did he not tell you that we were contending that the extra \$125 worth of work was merely a loan from your wife to you; that your contract was complete when you had performed \$100 worth of work?

A. No, sir.

Q. Has not that been discussed by you? Are you sure of that?

A. The matter of your (interrupted).

Q. That you understood that our position in the matter was that the first \$100 completed your contract, and the next \$125 if anything *would* a loan from your wife to yourself, as you had a lay on the ground. A. I never read that brief.

Q. But you understood that was our contention, did you not, Mr. Patterson? A. I believe I did.

Q. And you didn't understand that as our contention at the other trial, did you?

A. I think I did, or your (interrupted). [87]

Q. You know as a matter of fact that was not advanced at the other trial; that we didn't get an opportunity to advance it, don't you?

Q. Now, it is only since the last trial—it is only on this trial—this is the first time you have ever contended that there was any question about that first hole going to bedrock, isn't it? That is a fact, isn't it? A. I don't exactly understand.

Q. From the record of your examination on the former trial, I will ask you if these questions were

(Testimony of H. J. Patterson.)

not asked and these answers given by you at that time? (Reads:)

“Q. Her agreement”—referring to Mrs. Patterson—“with you was that she should sink a hole to bedrock and be entitled to a one-quarter interest?

A. Yes, sir.

Q. Why did she sink two?

A. Well, it called for representation work. And I think it calls for two holes to bedrock and for representation work for 1910.”

You so testified at that time, did you not?

A. Yes, I think I did.

Q. Are the conditions changed any in regard to what actually happened since the last trial?

A. Nothing more than I remember of the conversation and the difference of opinion.

Q. You remember now better than you did two years and a half ago when this case was tried?

A. Only in regard to that bedrock in that one hole.  
[88]

Q. This trial took place shortly after—within a few months after this transaction took place. Was your recollection better then, or is it better now, two years and half later?

A. Well, in regard to that hole I looked it up.

Q. Your recollection gets stronger, as time passes, in regard to it? A. No, not that particular point.

Q. How have you looked it up?

A. Well—(interrupted).

Q. Do you mean that you have discussed it with your wife? A. No, sir.

(Testimony of H. J. Patterson.)

Q. How have you looked it up?

A. I have discussed it with the drill-man.

Q. You have discussed it with the drill-man, and he has told you that that was the reason, has he?

A. No. In talking over the proposition, it recalled the conversation more than in the previous examination.

Q. In the first examination you had forgot that the first hole hadn't reached bedrock?

A. No. I didn't put it in, because—(interrupted).

Q. You didn't say anything about it.

A. I didn't say anything about the conversation.

Q. Were not these questions asked you and these answers given by you? (Reads:)

“Q. How many feet down was the first hole they sunk? A. The first hole was I think 100 feet.

Q. How much did they charge you a foot?

A. A dollar a foot. [89]

Q. When that first hole was sunk, sufficient money had been expended for representation work, hadn't it? A. Well—(interrupted).

Q. Why was the second hole sunk? You have no explanation?

A. Well, to comply with that agreement, with the conditions.

Q. Can you point out any part of this agreement that would require a second hole? Would you like to look at it and see?

A. No. I don't care to look at it.

Q. Isn't it a fact that Mrs. Patterson at that time

(Testimony of H. J. Patterson.)

was handling your money and keeping it in her own name and writing out checks for your business on the 19th—(interrupted)?     A. No, sir.

Q. — of September, 1910?     A. No, sir.

Q. Isn't it a fact that the sinking of those holes was your own personal business, and that you had her write out a check for your benefit?

A. No, sir.

Q. Wasn't the second hole that was sunk on the Daly Bench merely for the purpose of doing prospecting under the lease?

A. Well, no, I don't think it was.

Q. You don't think so?     A. No.

Q. What was it for then?

A. Well, as I say, to fulfill the conditions.

Q. One hundred dollars had been spent on the first hole?

A. One hole to bedrock to represent it, as representation work for 1910."

Did you so testify at that time?     A. Yes, sir.

Q. You remembered at that time that the hole was to bedrock, didn't you?

A. Well—(interrupted).

Q. And now you testify at this trial to-day, and yesterday, that that hole hadn't reached bedrock?

A. I didn't believe it did.

Q. You were not relying on anything you yourself remembered, [90] but from your conversation with the drill-man.

A. I remember the conversation with the drill-man.

(Testimony of H. J. Patterson.)

Q. Then, when you testified of your own knowledge that you had not reached bedrock, you were not testifying correctly, were you?

A. I didn't believe they were to bedrock.

Q. You remember that since you talked to the drill-man?     A. Yes, sir.

Q. Were not these questions asked of you and these answers given on the last trial? (Reads:)

“Q. How much did you think it took for representation work?

A. Well, I didn't know for sure what the representation work—whether drill-holes would constitute it.

Q. You didn't know whether one hundred dollars was a sufficient amount at that time?

A. Whether 100 feet of drill-hole would count that.

Q. Well, now, if one drill-hole wouldn't count, why did you think two would?

A. Well, it would be enough. It would be sure to be enough.

Q. Didn't you know that the law only required one hundred dollars' worth of work to be done?

A. Well, possibly.

Q. And you knew that the first hole cost one hundred dollars?     A. Yes.

Q. Still you thought if you drilled that first one that you had to drill a second one to comply with the agreement?

A. Well, I don't remember exactly. I didn't pay much attention to it, but to have enough done.”

Did you so testify at that time?     A. Yes, sir.



(Testimony of H. J. Patterson.)

Q. And now you say that the reason the second hole was sunk was because you couldn't see bedrock in the first hole?

A. Well, I didn't believe it was really to bedrock.

Q. When didn't you believe that? [91]

A. At any time.

Q. But you had forgotten that at this other trial. You had forgotten all about that at the other trial, had you?

A. Yes, sir. I didn't take it into consideration.

Q. This trial took place on September 26, 1913. That would be just about two years after the transaction took place—about three years after the transaction took place? A. Yes.

Q. Is your recollection better now, almost six years after the transaction took place, than it was at that time? A. I don't know as it is.

Q. And you want the Court to understand now that the sole reason for sinking that second hole was because you didn't think you had reached bedrock in the first hole?

A. That was one of the reasons.

Q. Is that the only reason?

A. No. I wouldn't give it as absolutely the sole reason, but it was one of the principal reasons.

Q. You were not looking for the paystreak, but merely to get a hole to bedrock?

A. I wanted to be sure to get a hole to bedrock.

Q. What did you mean, Mr. Patterson, when you stated in answer to a question that was propounded to you on the other trial, when you said (reads):

(Testimony of H. J. Patterson.)

“He didn’t find anything, and Mr. Craig had had a good deal of experience in drilling claims on the creek up above, and we were talking about it and he suggested further over would be a better change, and we went over to the left of the claim and started another hole, and that was put down 125 feet.”

What did you mean by that— a better chance for what? [92]

Q. What did you mean by that, Mr. Patterson? Was it a great deal of experience in seeking bedrock, or sinking holes, or a great deal of experience in where to look for pay, or what?

A. Well, I don’t know exactly what it was.

Q. You also had a lay on that ground at the same time, as shown by the records, Mr. Patterson, hadn’t you? A. Yes, sir.

Q. And, according to the testimony you have given, Mrs. Patterson was to put up the money to sink the drill hole, because you needed the money that you had to put down a working shaft if you struck pay. Wasn’t that it? A. Yes.

Q. Wasn’t that second hole put down purely and simply for the purpose of trying to locate the pay-streak?

A. In the carrying out of that agreement.

Q. I am asking you if the sole purpose wasn’t to locate the pay? A. No, sir, not the sole purpose.

Q. Isn’t it a fact that you were satisfied and that you knew that you had a hole to bedrock in that first hole?

(Testimony of H. J. Patterson.)

A. No, I wasn't absolutely satisfied. When Wickersham and I were getting ready to sign up the contract I told him that Mrs. Patterson was to have the interest, and when the work was completed I asked him if the deed could be made out to her; after the work was all done and Wickersham came back the next year I asked him to make out the deed to her and he made practically the same excuse that he made before.

Mr. CLARK.—Q. Mr. Patterson, the lease from Wickersham to yourself, that is, the second lease, given in November, 1911, was executed on the 12th of October 1911 was it not? [93]

A. I think it was about that time.

Q. When was that lease delivered to you?

A. On the date of record.

Q. It shows that it was recorded, filed for record on the 10th day of November, 1911? A. Yes, sir.

Q. Was that the day it was delivered to you?

A. Yes, sir.

Q. That was after the settlement with the Happy Home people? A. Yes, sir.

Q. Then you assigned that lease to Henry Hamilton on what date? A. The 27th of November.

Q. Had you done any work under that lease between the 10th day of November, 1911, when it was delivered to you, and the 27th of November, 1911, when it was assigned to Mr. Hamilton?

A. I think the work done on the Daly Bench at that time would come under that clause mentioned in that lease whereby I was to regain possession of that

(Testimony of H. J. Patterson.)

ground or stand the expenses of it and the litigation with the Happy Home people.

Q. Now, Mr. Patterson, wasn't the litigation settled upon the day when that lease was delivered to you, that is, the difficulties with the Happy Home people settled on that day?

Mr. HEILIG.—You mean it had been settled by that day?

Mr. CLARK.—Yes. And consummated by written agreement on that day?

A. On the day it was delivered?

Q. Yes. [94]

A. Yes. That was settled then.

Q. Mr. Wickersham was put in possession of the property, other than the strip transferred to the owners of the Happy Home? A. Yes, sir.

Q. What further acts were necessary to be done to obtain possession of the property after that settlement with the Happy Home people?

A. Please read that.

Q. (Question read.)

A. Well, we were practically in possession of the ground at that time. You see, during the controversy with the Happy Home people, Judge Wickersham sent for the Smith boys from Ruby, because they had staked or helped Pat Daly stake the claim, and they were the only ones that knew where the stakes really were. And when they came up here, Judge Wickersham sent them out to the Daly Bench and they moved onto the Daly Bench, took possession of it and held possession of it until the culmination



(Testimony of H. J. Patterson.)

of this difficulty or controversy. Then on November 27 I assigned that lease to Henry Hamilton. Between the 10th day of November, 1911, and the 27th day of November, 1911, when I assigned the lease to Henry Hamilton, I did not do any work on the Daly Bench myself. During that time I had not performed any mining work nor built any cabins nor anything of that kind. I had agreed with [95] Wickersham to give George Smith a sixty per cent lease on that 250 foot strip, and when I made the transfer of the lease to Hamilton he also agreed to make the papers, something to that effect. I was to back Smith in a way. I was to furnish him credit and pay a certain amount of his expenses, pay the expenses up to that time, and when I was closed down and couldn't do that I told Smith that I would give him five per cent more and he could get somebody that could carry on and finance the proposition for him, and he agreed with me to pay back all of the money that I had expended there, because it was Last Chance money. After I was closed down on the Last Chance Association claim I did not do any more work *work* or spend any more money of the claim. I worked for Smith for wages, for Smith & Hamilton, a month or six weeks, maybe two months; I didn't expend any money there myself, I hadn't any to expend. At the time the lay from Wickersham was delivered to me I expected to go ahead and work a part of the ground myself. I couldn't say that Wickersham knew at that time that I was going to assign the lay to Hamilton, I don't know now. I



(Testimony of H. J. Patterson.)

think Hamilton and I got Henry Ray's consent to the lease at the time it was made. I think I testified at the former trial of this case that under the lease I had spent a good deal of money of my own on the Daly Bench prior to the time that I delivered the deed to Mrs. Patterson; that I couldn't say just how much; that I had to regain possession, help to regain possession of the ground in order to renew my lease; I was asked whether it was not something over \$1,400, and I answered that that was not all prior to the making of the deed, that work was continued through until January, the sinking of the shaft; we had put some men on there to regain possession of the ground, to hold possession of the ground, putting up buildings; that none of that money was Mrs. Patterson's. Hamilton agreed to carry out my agreement with Smith to sublet the lay on that upper 250 feet. I wouldn't say that I did not testify heretofore that it was understood between Wickersham and I when I got the lease that he would consent to a sublease to Hamilton. [96]

Q. After this transfer was made to Henry Hamilton of that lease from Wickersham, you recognized that he had stipulated in that agreement to fulfill all of the conditions that Wickersham had imposed upon you in that lease, didn't you?

A. Well, I tell you it was made in such a hurry that I didn't look at it carefully at that time?

Q. You knew that Henry Hamilton was, in other words, stepping into your shoes so far as that lease was concerned?

(Testimony of H. J. Patterson.)

A. Practically. I considered it so.

Q. Yet you continued working there until January, building buildings, didn't you?

A. Until January?

Q. Yes. A. No, I don't remember that.

Q. Didn't you continue sinking a shaft and building buildings up through January—December and January? [97]

A. I was trying to think when we moved over there.

Q. You can't answer that question.

A. I don't think I can.

Q. To refresh your memory, did you not testify in the former trial? (Reads:)

“That work was continued through until January—the sinking of the shaft. We had put some men on there to regain possession of the ground—to hold possession of the ground—putting up buildings.”

A. The Smith Brothers kept on working there, finishing the shaft and fixing up.

Q. At the time you had spent fourteen hundred dollars? A. Yes, sir.

Q. And when you turned the lease over to Henry Hamilton, two or three months before that, you were not to get anything for the lease. Is that right?

A. No, sir.

Q. What were you to get for the lease?

A. I was to get the difference between the Smith lease and the Hamilton lease, five per cent.

Q. You were to get a secret five per cent?

(Testimony of H. J. Patterson.)

A. Yes, sir.

Q. You are certain of that?      A. Yes, sir.

Q. And there was a consideration then for your transfer to Henry Hamilton?

A. The promise, as I said. A promise of five per cent.

Q. That was your consideration for your transfer to Henry Hamilton, was it?      A. Yes, sir.

Q. Then, that was the consideration for making the transfer to Henry Hamilton. [98]

A. One of the considerations.

Q. You testified at the last trial of this case, did you not, Mr. Patterson, and was not this question asked you and this answer returned? (Reads:)

“Q. After you got that lease, you assigned it to Mr. Hamilton for what consideration? What did Hamilton give you for it?

A. Well—I didn’t receive any money for it. No.

Q. What was the consideration, then, for your transfer to Hamilton?

A. There was no real consideration.”

Did you so testify at that time?      A. I did.

Q. And yet you say now that the consideration was a secret five per cent that was to come from the Smith Brothers.

Mr. HEILIG.—Wait—(Interrupted).

A. Yes, sir.

Mr. HEILIG.—I object to counsel reading merely an extract. He should read all of the testimony on that subject.

(Testimony of H. J. Patterson.)

Mr. CLARK.—You can read it when your time comes.

Q. You testified before the Referee in Bankruptcy, didn't you, Mr. Patterson, at the first meeting of your creditors?     A. Yes, sir.

Q. This question. (Reads:)

"Q. And you, if you worked the lay, were to get seventy-five per cent. You were to retain seventy-five per cent, is what I mean. If Wickersham was to get twenty-five per cent, you were to keep the other seventy-five per cent, were you not?"

A. Well, there was five per cent of that to go to the quarter interest.

Q. How do you mean five per cent was to go to the quarter interest?

A. I let the lay—I made a deed to Mrs. Patterson of the quarter interest, and a seventy per cent lay to Mr. Hamilton. [99]

Q. And there was five per cent to be retained by you, wasn't there?

A. No. That was for the quarter interest."

Did you so testify at that time?     A. I did.

Q. And at that time you were, in addition to that amount, to receive a secret five per cent from George Smith?

A. A promise from Mr. Hamilton to that effect.

Q. Then your statement here was not correct, that there was only five per cent retained.

A. That five per cent was to go to the quarter interest.

Q. (Reading:)

(Testimony of H. J. Patterson.)

“Q. How did it go to the quarter interest?

A. Well, because that was the agreement.”

That question was asked and that answer given by you, was it not? A. I think it was.

Q. Was not this question asked of you, and this answer given? (Reads:)

Q. “And you sublet to Henry Hamilton for seventy per cent.

A. Yes.

Q. The other five per cent is to be paid to you, isn't it?

A. It was, but I transferred that. That went to the quarter interest.”

Was that question asked of you and that answer given at that time?

A. I don't remember. It may possibly have been.

Q. Would you say that it was not? A. No.

Q. Was not this question asked and answer given? (Reads:)

“Q. How does it go to the quarter interest? Did you convey it in that deed to your wife?

A. No. It was not exactly stipulated.

Q. It was not stipulated, as a matter of fact?

A. But that was the intention. [100]

Q. As a matter of fact, the five per cent, the difference between the seventy-five per cent and the seventy per cent, is to be paid by the present laymen on that ground to you, isn't it?

A. I think that is the way the papers read.”

Were those questions asked you and those answers given by you at that time? A. Possibly. Yes.



(Testimony of H. J. Patterson.)

Q. Would you say that it was not?      A. No.

Q. (Reading:)

“Q. Therefore, five per cent of the gross output under the lay upon the Daly Bench is payable to you? Isn’t that correct?

A. That is according to the way the papers reads.

Q. And five per cent of all money taken out by Mr. Hamilton under that lay should go to your estate to pay your debts, should it not?

A. No. To the quarter interest. That was to go to the quarter interest.”

Was that question asked and that answer given by you at that time?      A. Possibly.

Q. Would you say it was not?      A. No, sir.

Q. Is your memory on that subject better now than it was when you were being examined before the Referee in Bankruptcy to ascertain what property you had that was to go to your creditors?

A. I don’t know.

Q. Why didn’t you in this examination at this time, Mr. Patterson, disclose the fact that you had made a secret agreement with George Smith to get an extra five per cent?

A. Well, I haven’t any reason to give.

(Controversy between attorneys. No answer.)

[101]

Q. That is your answer, is it? You knew at that time that I, on behalf of the creditors, was seeking to locate the property that you had that should go to pay your debts, didn’t you?      A. Yes.

(Testimony of H. J. Patterson.)

Q. You knew you were under oath at that time, didn't you?     A. Yes, sir.

Q. You had been sworn to tell the truth, the whole truth, and nothing but the truth, hadn't you?

A. I had.

Q. You didn't disclose that extra five per cent when I asked you about the consideration that you were to get for that lay, did you, Mr. Patterson?

A. It was only a promise, and I didn't pay much attention to it.

Q. I was asking you what you received—what the consideration was for the transfer of that lease to Hamilton, and what royalty and what gold dust you were to receive wasn't I?

A. I don't remember that.

Q. You know, as a matter of fact, that I was, and that that was the only purpose that I had, was to find out what percentage of the output of that claim was to go to you. You knew that, didn't you?

A. Yes, sir.

Q. And you concealed that fact?

A. I didn't consider it amounted to anything.

Q. It didn't amount to anything. Five per cent only amounted to several thousand dollars, didn't it? [102]

Q. Was not this question asked and this answer given? (Reads:)

“Q. And the quarter interest in the claim gets itself six and a quarter per cent of the output, doesn't it?     A. No.

Q. The owners of the Daly Bench are to get

(Testimony of H. J. Patterson.)

twenty-five per cent of the output, are they not?

Mr. HEILIG.—(To Mr. Clark.) That is not what you said.

A. No.

Mr. CLARK.—Q. Who is to get the twenty-five per cent?

A. Now, I don't know whether I could make it any better by explaining a little bit in the matter.

Q. I will ask some more questions. Who signed the lay to yourself? A. Wickersham.

Q. Who else, if anybody? A. No one.

Q. You were an owner in the ground, were you not, at the time that that lay was executed?

A. According to the papers, yes, sir."

Those questions were asked and answers given, were they not? A. I think they were.

Q. Were these questions asked and answers given? (Reads:)

"Q. And at the time that lay was made it provided that twenty-five per cent should go to James Wickersham? A. Yes.

Q. And seventy-five per cent should be retained by you as lessee? A. As a lessee and owner.

Q. Did it say "lessee and owner"? A. No.

Q. Well, then, afterwards James Wickersham transferred a quarter interest in that claim to you?

A. It was made at the same time with the lease. It is a part of the lease. That is—(interrupted).

Q. The lease was executed before the deed was made to you, was it not?

A. Well, yes. But the lease called for the trans-

(Testimony of H. J. Patterson.)

fer of the deed, as far as I can remember.”

Those questions were asked, and answers given, were they not? A. I believe they were. [103]

Q. Were these questions asked you and these answers given? (Reads:)

“Q. You never have assigned to Mrs. Patterson the five per cent that you retained by virtue of being a lessee from James Wickersham, have you?

A. I included it in that deed.

Q. It is not included in the deed to your wife, is it?

A. That five per cent was supposed to represent the quarter interest.”

Were those questions asked you and those answers given at that time? A. I believe they were.

Q. Was the five per cent secretly reserved to you from the George Smith lay supposed to be included in the transfer of the quarter interest to Mrs. Patterson? A. Repeat that.

Q. (Reading:)

“Q. You have never assigned to Mrs. Patterson the five per cent that you retained by virtue of being a lessee from James Wickersham, have you?

A. I included it in that deed.

Q. It is not included in the deed to your wife, is it?

A. That five per cent was supposed to represent the quarter interest.”

I ask you now whether that secret five per cent was what you were referring to here, and whether that was to be transferred to your wife with the title to the property? A. No, sir.

(Testimony of H. J. Patterson.)

Q. Was this question asked you and answer given?  
(Reads:)

“Q. There is no assignment of this lease or your interest in this lease, to Mrs. Patterson?

A. No. Not of the lease.

Q. There has never been any assignment in any other way of any interest in this lease to Mrs. Patterson? A. No.

Were those questions asked and those answers given at that [104] time? A. Possibly.

Q. Would you say they were not? A. No.

Q. Were these questions asked and these answers given? (Reads:)

“Q. At the present time you are still the owner of five per cent, as far as the records go, of the gross output of gold extracted from the Daly Bench by Hamilton under the lease under which he is now operating? A. As far as those papers go.”

Those questions were asked and those answers given, were they not? A. Possibly.

Q. After this deed was made to Mrs. Patterson, I understood you to tell Mr. Heilig that you had no further interest in the royalty in any way and you considered all the royalties as going to Mrs. Patterson. You testified that way this morning, did you not?

Mr. HEILIG.—His royalty on the quarter interest.

Mr. CLARK.—No. I am asking about the royalties.

A. I meant the five per cent should go to the quar-



(Testimony of H. J. Patterson.)

ter interest as was always intended.

Q. You are not referring to this other five per cent, the secret five per cent which was coming from George Smith.

A. That was merely a promise. It was ground that there was nothing struck on, or anything of the kind. There was not anything in view, or any value; so to speak; and afterwards when the royalty was reduced by James Wickersham I gave up all claim or released them from their promise of any kind.

[105] I had given up the secret reservation of five per cent that George Smith had made before any money was taken out or any money struck. I had not given it up on November 27, 1911, when I gave the deed to Mrs. Patterson. I wasn't figuring on anything of the kind; it was just a wildeat proposition and I didn't think anything of it. At the time I took the agreement I considered it as possibly amounting to something, and when I made the sublease to Hamilton on November 27 with the understanding that he would give George Smith a lay I considered it might possibly turn out something; and after the deed was made to Mrs. Patterson I was possibly interested in the royalty to be derived from the claim. Hamilton went in with the Smiths and they worked the ground. The ground had no known value on November 27, 1911; it possibly had a market value of \$10,000. The whole of the Daly Bench could have been sold for that sum before Hamilton did any work under that lease; I believe it had a market value of that much. It had a possible value

(Testimony of H. J. Patterson.)

at the time I gave a sublease to Hamilton; I recognized it as having a possible market value. I testified at the former trial that I thought it was possible that the Daly Bench could have been sold in the market for considerably over \$10,000 on the 27th of November, 1911. There was no consideration from Hamilton for my transfer of the lay to him except the promise. When I was expending that \$1,400 on the claim up until January I was helping Smith. I was expending money and I would likely have continued with it and would have received an interest, a share in the profits of that lay, and if I had been allowed to continue in it I would have made enough to have paid all of my creditors. [106]

Mr. CLARK.—Q. You had a written agreement with Mr. Hamilton whereby in this sublease you receive five per cent more than was necessary to pay Judge Wickersham, didn't you—the royalty that you say went to your wife.

A. I am getting confused now.

Q. I will make it clear. In your sublease to Mr. Hamilton he covenanted to pay Wickersham twenty-five per cent and you five per cent; and you say that five per cent went to your wife.

A. Yes, sir. [107]

Q. Now, didn't you attempt to use that for the purpose of getting a little credit, or use that as security to Mr. Bruning? A. That five per cent?

Q. Yes. To Mr. Bruning?

A. No. I made the deed that same day to Mrs. Patterson.

(Testimony of H. J. Patterson.)

Q. And did you make a proposition to Mr. Bruning whereby that five per cent was involved?

A. I remember a conversation with Mr. Bruning.

Q. Just state what that conversation was.

A. Something of the kind.

Q. What was it?

A. The possibility of giving him security.

Q. Of that five per cent?

A. On a quarter interest.

Q. That was for your personal indebtedness to Mr. Bruning.     A. Yes, sir.

Q. Just state what the proposition was that you made to him at that time.

A. I don't remember, but it was regarding a possibility that I could do such a thing.

Q. When did that conversation take place?

A. I don't remember the exact date now. It was I think before—yes, I think there was a cleanup before—I think it was next to the last cleanup.

Q. Just state what that conversation was, Mr. Patterson.

Q. State that conversation, Mr. Patterson. [108]

A. I think the proposition came up over that check to Mr. Peoples.

Q. Yes? Go ahead and give the details.

A. And Bruning told me that Mr. Peoples was very mad about it, but he had told Mr. Peoples that he would have to wait until the next cleanup. And Mr. Bruning was very much worried, and I told him that possibly I might be able to give him security on that quarter interest; that I might possibly give him

(Testimony of H. J. Patterson.)

security on that quarter interest.

Q. Just to refresh your memory, Mr. Patterson, that conversation took place after the deed was made to Mrs. Patterson, didn't it?

A. I don't think so.

Q. You would not state that it didn't, would you?

A. Well, now, I wouldn't say.

Q. When, as a matter of fact?

A. The time was so close in there that I couldn't possibly place the date.

Q. Now, just to further refresh your memory, wasn't it something about a little security to Mr. Bruning for the money advanced by him, that he had advanced personally to help you?

A. Now, I don't remember that.

Q. Would you say that that was not the purpose for which you had approached Mr. Bruning?

A. No. I couldn't say that for sure.

Q. Wasn't the proposition this, Mr. Patterson, that after the deed had been made to your wife that you then had a conversation with Mr. Bruning relative to him taking over some other indebtedness and you indemnifying him by giving [109] an assignment of the five per cent that was coming out under the Hamilton lay? A. No, sir.

Q. Nothing of that kind?

A. No, sir. What I spoke to Mr. Bruning about was the quarter interest.

Q. Just the quarter interest? A. Yes, sir.

Q. But wasn't that after the deed was made to Mrs. Patterson? A. I don't think it was.



(Testimony of H. J. Patterson.)

Q. Don't you know, as a matter of fact, Mr. Patterson, that it was some little time after the deed was made to Mrs. Patterson?

A. No. I don't think so.

Q. Are you more certain than you were a few moments ago?

A. No. But I am trying to recall it as much as I can.

Q. You have the transaction pretty clear in your mind; that particular transaction?

A. I have a recollection of the transaction, something of the sort, but I can't remember it now.

Q. You have talked it over with your wife, haven't you?     A. The transaction?

Q. That particular transaction.

A. I told her of the offer.

Q. Of the offer made by you?

A. To give Mr. Bruning security.

Q. That is, Mr. Bruning personally.

A. Yes. [110]

Q. And she will testify that she told you it was hers and that she didn't want you to do it?

A. No. She objected to it, refused to do it.

Q. That will be her testimony on that point, will it?     A. Well, I don't know.

Q. You never have discussed the matter with her?

A. That is the way the thing occurred, as near as I can remember.

Q. To refresh your memory, Mr. Patterson, didn't that conversation take place before your petition was filed in bankruptcy, but a considerable time after



(Testimony of H. J. Patterson.)

you had closed down your works out on Engineer Creek?

A. I think that it occurred over that check of Mr. Peoples. That is my recollection.

Q. There was considerable controversy over that check after that deed was made to Mrs. Patterson, wasn't there? A. I don't—I can't recall it.

Q. Just to refresh your memory and fix it, did you not testify this morning that you didn't know that that thousand dollar check hadn't been paid, or that they hadn't paid it, until after the deed was made to Mrs. Patterson?

A. I don't remember to have testified that way.

Q. Was not the question asked of you this morning by Mr. Heilig as to whether or not you knew about that thousand dollar check being entirely rejected by the bank?

A. Oh, so far as its being entirely rejected, yes.

Q. That didn't happen until after you had made the deed to Mrs. Patterson of this interest, did it?

[111] A. I didn't know that it hadn't.

Q. And, therefore, any controversy or any discussion about that check being finally rejected must have been after the deed was given to Mrs. Patterson.

A. The controversy I refer to is the time Mr. Bruning turned the check down, or told Mr. Peoples that he would have to pass it over to the next cleanup.

Q. But, Mr. Patterson, did you not testify this morning that at the time that you made the deed to Mrs. Patterson you didn't know that the bank was

(Testimony of H. J. Patterson.)

going to take that fifty-five hundred dollar cleanup that came in—(interrupted).

Mr. HEILIG.—That is the last cleanup?

Mr. CLARK.—Yes. —and that you supposed that they would pay the checks that you had issued before that? A. Yes.

Q. Therefore, that at the time you made the deed, you supposed that that thousand dollar check was going to be paid?

A. I supposed it was going to be paid out of that cleanup.

Q. Now, to refresh your memory, wasn't it after the bank had taken that fifty-five hundred dollars, and Peoples was making a considerable complaint about his thousand dollar check not being cashed, that this whole matter came up? A. No.

Q. Why was there any controversy before that when the bank had merely told Mr. Peoples to wait until the next cleanup?

A. It was the move that Mr. Peoples was making when that check was turned down that caused Mr. Bruning to seize that cleanup. [112]

Q. You were willing to give that quarter interest to protect the bank or to protect Mr. Bruning?

A. Mr. Bruning was a very good friend of mine and I would have done anything in the world to help him out that I could.

Q. And you were willing to pledge what you say now is your wife's interest to accomplish that.

A. With her consent.

Q. Where did that conversation take place?

(Testimony of H. J. Patterson.)

A. I don't know. I think it was somewhere in the bank. I can't hardly recall it.

Q. Did you consider that the bank was going to continue to pay all checks that were presented, regardless of whether there was any *finds* there to pay them or not, that is, from your Last Chance operations?

A. Well, I couldn't tell. I had no—(interrupted).

Q. Had you ever had any agreement with the bank whereby they were going to back you indefinitely?

A. No, sir, I had not. [113]. When I was making up the sublease with Hamilton I didn't put in the provision about the Smith boys going to have a lease on the property because Smith was not present. I didn't bind Hamilton to give him a lease, but when he took this lease he agreed to give the Smith boys a sublease. At that time I owed something like thirty or thirty-five thousand dollars. I did not have put in the lease that I was to get an extra five per cent from George Smith because the terms of the Smith lay were for sixty per cent in the first place and I expected to be a partner in the lease; I couldn't come through on the proposition and I told him, just a verbal proposition, a promise, that I would give him the five per cent if he would get some reliable man to back him. That is the same George Smith that is now in the penitentiary for grand larceny. Smith owed so much money that it was absolutely impossible for him to have it in his name. The way Wickershaw put it to me was, he said, "Now, George has

(Testimony of H. J. Patterson.)

been dogged to death around here; I believe George, if he had a chance, would make good," and I told him that I didn't think that George would make good, but he just seemed to think that George Smith, if he had a chance, would make good. George Smith was really the man who sold Wickersham the claim, that is he made the [114] deal between Pat Daly and Wickersham; he asked me personally to give Smith a chance. He tied me up; he made me responsible for everything, yet forced me to give Smith the best of it.

Q. Now, in getting that lease from Wickersham, did you consult Mrs. Patterson about the terms of the lease, that is, that last lease, the one of November, 1911? A. I think we talked it over.

Q. It was dated October 12, 1911, but wasn't delivered until November? A. Yes.

Q. You talked it over beforehand?

A. In conversation. I don't remember now. [115]

Q. Didn't you testify, in answer to a direct interrogatory by Mr. Heilig this morning, that you talked it over with your wife and she agreed to the terms of it? A. The terms of that lease?

Q. The terms of the lease with Wickersham.

A. I don't remember.

Q. Didn't you testify that she knew the terms of it and agreed to it before he signed up the lease?

Mr. HEILIG.—He didn't testify to that at all.

Mr. CLARK.—That is my remembrance and recollection of it.



(Testimony of H. J. Patterson.)

Q. What is the fact: Did you discuss it with her or not?

A. Why, I always talked over matters with her.

Q. Did you discuss that particular matter?

A. I couldn't state the exact conversation in particular, but I know that there was a very—we were very much displeased with the way the thing was forced out different from the last lease, and the burdens imposed on it, but, under the circumstances, why, she agreed to them having it or to take it.

Q. Did you ever tell her about the terms and conditions of that lease, how it bound that one-quarter interest for all the royalties and against all damages that Wickersham might suffer? A. I did.

Q. Did you tell her that Wickersham was to receive twenty-five per cent of the gross output of all gold that came out of the claim, out of her quarter interest as well as out of his three-quarters' interest? [116]

A. No, sir. I told her that Wickersham was to receive the twenty-five per cent out of the gross output.

Q. Did you show her the lease?

A. I don't know whether—I took the lease home to the house. I don't remember whether we read the lease over together or not, or how, or whether she read that, or whether I just simply explained some of the matters to her.

Q. When you were making that compromise agreement with Horner & Company, the Happy Home people, did you tell her about the terms and condi-



(Testimony of H. J. Patterson.)

tions of that compromise agreement?      A. Yes, sir.

Q. Did she understand fully what was being done?

A. Yes, sir.

Q. She agreed to it?

A. Well, she didn't like to agree to it. She objected to it.

Q. Did she agree to it?      A. Yes.

Q. Did you show it to her?

A. No. I didn't show it to her, but I told her the conditions; that we were to give them seventy-five feet. There were three or four propositions brought up in that controversy. One that they offered to take, to settle, for half of the claim, either take the lower half or the upper half. We refused to do that. They came back with another proposition; that they would take 150 feet off of the upper end, which we also rejected. And finally they agreed to take seventy-five feet, and, with the burden I was carrying and the way I was tied up to Mr. Wickersham, I asked her to consent to the settlement. She didn't think that they ought to have anything. [117]

The drill holes were sunk with my wife's money; she paid for them; she caused them to be sunk. In my testimony before the referee in bankruptcy on May 1, 1912, I possibly testified, when asked how I first acquired the interest in that property, that there was a previous agreement sometime in 1910, a written agreement on record and that under that agreement I was to sink a hole to bedrock [118] and that I caused it to be sunk.

I can't give the exact date when the Hosler note

(Testimony of H. J. Patterson.)

was paid by him and myself. I know it was after we settled up, after a settlement of his affairs and mine; probably in the summer of fall of 1910 I think the Ready Bullion Mining Company closed down in June or July, 1910; the payment was made some time after that, I don't know just when; it was before he went to Hot Springs. It was not immediately after the closing down of our works out there, I don't think I know that Hosler and I made a trip to the Beaver country and didn't get back here until just before the 4th of July; I can't give you the actual date. Possibly I testified before the referee in bankruptcy on May 1, 1912, that this money was received from Hosler immediately after the Ready Bullion Mining Company wound up their lay there; I think in the spring of 1910 or 1909; I wouldn't be positively sure.

After I came down here from the Dawson country I engaged in several mining ventures; I worked for wages first.

I don't know what was done with the note as soon as Hosler paid his part of it; we had the books and papers and everything there on the table. I saw the note at the time that settlement was made; it was at our house; I think it was on the table. Mrs. Patterson figured up the note, and the interest that it carried would be quite a large sum but owing to the old associations and the long time she agreed with Hosler that she would settle for the principal and \$100 interest, \$50 each; the note was there in his presence when we were in the settlement; whether he took the note away or not I don't know. At the last trial I tes-

(Testimony of H. J. Patterson.)

tified that the note was delivered to Hosler when he paid his share; that I didn't know why it was not marked paid; that we got up and went away and probably overlooked it; that he didn't take it with him; something of that kind.

The first mining venture that I went into after I came down from Dawson, on my own account was an option and lease on 4 below Esther creek; it was on the upper end of the Tolbert bench; I worked there about a week or ten days; I didn't make any money there. [119]

I was with my wife when she staked that ground in the Dawson country; I set up the stakes for her and she wrote on them; then she hired a surveyor to survey it; I think I paid him for that. Mrs. Patterson went and attended to the recording; I might possibly have furnished her the money; she wasn't in business for herself and she wasn't working for wages; the only money she had was furnished by me; excuse me, Mrs. Patterson had some little money herself but I don't know what. Possibly I gave her the money with which she paid for the crown grant giving her the right to the ground for a year; each year that crown grant had to be renewed upon the payment of additional sums of money; it was fifteen dollars I think for renewing the claim.

I heard of Horner making a big strike on the Happy Home claim; I remember the incident; I was working on Engineer at the time; I did not after that became public go into the boiler-house and remind John Junkin that I owned a quarter interest

(Testimony of H. J. Patterson.)

in the Daly Bench and say to him that the pay was sure to run through my bench from all indications and the way it was lined up; I never had any such conversation.

When I turned over the lay to the men on Last Chance in November, 1911, I considered that the money was there in the ground and if it was handled properly it would cover the indebtedness. I did not consider that it had any value or could have been sold for anything, what I had uncovered, to inexperienced people. On the former trial I testified that I assigned my lay on Last Chance Association; that I got no consideration for it; that it was pretty hard to estimate the value of that lay on the 27th; that I could not have sold it for anything, but if it had been properly worked I am satisfied it was equal to the debts, but I couldn't say that there was profit in that particular ground or not. But there were two blocks of ground untouched above included in that lay and which could have been opened up much easier than the piece of ground that I did open. After the receiver had been put in there I offered my services in every way possible to offer. I offered everybody every assistance that I could. [120]

#### On Redirect Examination.

I gave Hamilton the seventy per cent lay on the whole lease with a promise that he would give Smith a lease at 75% or at 65%, and if they made anything that he would give me five per cent, the difference between the two; that five per cent was the difference between the 70% and 65%; the 70%



(Testimony of H. J. Patterson.)

which Hamilton was to pay to Wickersham, or the 25%, and the 5% to the quarter interest. Under my arrangement with Hamilton he was to retain 70% for himself, and he promised to sublet 250 feet of a strip to the Smith Brothers and the balance of it he worked himself; he was to work the middle 300 feet and then he and I together were to work the lower half which would naturally be wet; we never worked the lower half; I did not work any ground with Hamilton. On the part that Hamilton worked, which he did not sublet to Smith, he was to pay 20% to Wickersham and 5% to Mrs. Patterson; that is after Wickersham had reduced his royalty from 25% to 20%; that is the arrangement under which Hamilton worked the lay except the 250 foot strip which he worked in partnership with the Smith brothers. Hamilton paid to Wickersham 20% and was to pay 5% of the gross output to the owner of the quarter interest, but under the injunction he had to pay it into court. In the 250 feet that he worked in co-operation with the Smith brothers he had one-third interest and they had two-thirds. For the working of that 250 foot strip they were to pay as royalty 20% to Wickersham and 5% to the quarter interest. The only further arrangement regarding royalty to be paid was Hamilton's promise to me of 5%, the difference between the Smith lease at 65% and the 70%. Under the arrangement the Smith Brothers & Hamilton were to pay 30%, and the other 5% *per cent* that I speak about was to go to me. When they sunk the shaft and



(Testimony of H. J. Patterson.)

run the tunnels and didn't find anything I relinquished any right to any five per cent and then the royalty paid by the Smith Brothers & Hamilton for the working of that 250 foot strip was 30%; no, I am wrong; when they had sunk the shaft and run the tunnels and didn't find any pay they asked me to go with them to Mr. Ray and to get them a reduction of the royalty. [121] They asked for a ten per cent reduction on this 250 feet from Henry Ray, but he wouldn't do that because he thought that the upper part would probably be the only place where there would be any pay on the ground, but he offered to reduce the royalty five per cent on the whole claim, and that reduced it to 25%. He reduced Wickersham's royalty to 20%, and I relinquished any claim I had under any understanding or promise, and that left the royalty to be paid by the Smith Brothers & Hamilton 25%. I never got anything for this five per cent that was promised me under the arrangement with the Smith Brothers; I had relinquished my claim to that five per cent long before anything ever came out of the ground. This money which was paid into court by Hamilton, that five per cent royalty paid by him into court, by Hamilton, belonged to the quarter interest.

The \$1400 that I expended in helping the Smith Brothers was under the promise of a lease; it was under that paper referred to in the lease; it commenced under that and it was financing and helping Smith to sink the shaft and put up buildings and running a tunnel. It was money of the Last Chance.

(Testimony of H. J. Patterson.)

I drew checks on the bank here; they were paid in checks on the American bank when I was working on Engineer; I gave checks for these amounts and they were cashed by the bank. I don't know for sure whether the bank was aware that I was making those payments. This \$1400 was expended in sinking the shaft and clearing ground around there and putting up buildings. When I was closed down I told George Smith that they could get somebody to finance the proposition for them; I would give him five per cent more but they must take over the dead work that had been done; it figured up something like \$1400. When I came in I told Bruning that George had promised to pay that and that is why he segregated the Eva creek account. I think I gave a separate note for it.

I don't know how you would estimate the market value of the ground. Of course if you are going to estimate real value you would want to test the ground to be able to figure it.

At the time I signed this deed to my wife nothing had been found on the ground of value. [122]

The market value of a placer claim is a very hard thing to explain. If the ground was opened up so that you could get an opportunity to test it and get an idea of the real value, then it would be something, and the market value is generally based on reality. But in placer mining it may be valued at \$10,000 to-day and absolutely nothing to-morrow. It depends on the hole when it gets to bedrock. We had no holes, that is, there were two drill holes *in* believe

(Testimony of H. J. Patterson.)

at the time, but I didn't know the value of either of those two drill holes. When I testified it had a market value of \$10,000 I meant that the adjoining property possibly gave it a possible value, that is, people would be willing to take a gambling chance on a claim that has absolutely no holes to bedrock. If a man had taken an option on the ground for \$10,000, after the shaft was put down and the tunnels run he would have walked off and left it; yet there was \$30,000 or more profit out of the lay.

**Testimony of Fred W. Craig, for Defendants.**

Thereupon FRED CRAIG, as a witness for defendants, testified:

In the summer and fall of 1910 my business was prospecting and drilling holes with a Keystone drill on placer ground. I received this check now handed me, marked Defendants' Exhibit 4 on the Washington-Alaska Bank for \$225 to my order, dated September 21, 1910, signed by Mariam A. Patterson; that check was paid. The service we performed for which that check was given was drilling two holes that many feet at a dollar a foot, on the Daly Bench on Eva creek; my map shows that the first hole was 103 feet deep and the second hole was 122 or 23 feet; I made my charge for the work \$225. We never knew for sure whether the first hole that we sunk was to bedrock or not; there was a controversy at the time; we were down—we couldn't put the drill in the hole again so Mr. Patterson told us to sink another one. There was 25 or 30 feet of thawed muck above bedrock; the *muck* is very solid; if you

(Testimony of Fred W. Craig.)

drill very quick you can get down to bedrock, but it keeps squashing in gradually and after half an hour you dare not put the drill down any more. As I remember it it was because of the doubt that the first hole was to bedrock that we sunk a second hole; the second hole went to bedrock [123] we proved that was bedrock.

### On Cross-examination.

As I understood it at the time the reason that I remember sinking the second hole was to see whether or not there was gold on bedrock, and I suggested where the second hole would be myself, and fixed the place for that second hole in the place that I considered likely to have a paystreak if there was one there.

### Testimony of Henry T. Ray, for Defendants.

Thereupon HENRY T. RAY, as a witness for defendants, testified:

I have been for many years a resident of Fairbanks; since 1910 or 1911 I have been Judge Wickersham's representative and attorney in fact with reference to the mining claim known as the Daly Bench on Esther creek, during his absence. I knew he had executed a lease to Harry Patterson on the Daly Bench. I executed the sheet consisting of six lines of typewriting attached to Plaintiff's Exhibit "B," the lease dated October 12, 1911, from Wickersham to Patterson. Mr. Patterson, the Smith boys and Mr. Hamilton came to town and stated that they were going to throw up the lease unless I gave them



(Testimony of Henry T. Ray.)

ten per cent more than the lease called for. The lease called for 75% and they wanted 80%; they had done a lot of work and found no pay and they were going to throw up the lease unless I gave them 10% increase, and after talking it over with them, I made them a counter proposition to give them 5%. This 10% was to apply on the upper 250 feet of the ground; I made them a counter proposition to give them 5% on the whole claim as covered by the original lease; after considering it they accepted the proposition; they were to go on 30 days more; they stated that they would do 30 days more work and if they didn't find anything by that time they were going to quit the ground; that is the reason I increased the percentage.

I collected as royalty from Henry Hamilton and the Smith Brothers 20% of the gross output. I wrote the words, "I hereby consent to the subletting of the mining ground described in the lease referred to. James Wickersham, by Henry T. Ray, attorney in fact," [124] written at the bottom of the instrument now shown me, Plaintiff's Exhibit "E," purporting to be a lease dated November 27, 1911, by H. J. Patterson to H. C. Hamilton, and purporting also to incorporate an assignment of the Wickersham lease. What I wrote refers to the original lease that is mentioned in the document from Wickersham to Patterson; the addendum there is in my own handwriting. I subsequently attended cleanups that were made upon that piece of ground while the Smith Brothers and Hamilton were operating there;



(Testimony of Henry T. Ray.)

I collected 20% royalty for Wickersham; at the first cleanup held by them there were present the Smith boys, Hamilton, Mrs. Patterson, Harry Patterson and myself. I think while I was present I heard Mrs. Patterson make a demand for royalty accruing to her by reason of her ownership of a quarter interest in the ground, but I am not clear about it. I got my royalty first, my 20%, the balance of the dust I was not particularly interested in. But Mrs. Patterson, if I recollect right, she said she was there and she wanted her royalty. I didn't know what royalty she had reference to particularly. Mrs. Patterson was there on a number of occasions. During the time that active operations were carried on there Wickersham was absent most of the time. I, as his representative did not at any time make any objection to Hamilton or the Smith brothers or both carrying on mining operations on that ground.

I have lived continuously in the Fairbanks mining district since September, 1904; during that time I was deputy recorder for a little over four years; after that I followed conveyancing and notary work; I have done considerable conveyancing of mining claims situate in Fairbanks precinct.

**Testimony of Mariam A. Patterson, in Her Own  
Behalf.**

Thereupon MARIAM A. PATTERSON, one of the defendants, testified:

I was married to H. J. Patterson on June 3, 1896; came to Yukon Territory in 1901; remained there five years; I was there during the year 1905; in 1906

(Testimony of Mariam A. Patterson.)

I went outside for about three years and then came to Fairbanks where my husband was then; while in the Yukon Territory I lived with my husband at various places, mostly on Bonanza creek. (Check marked Defendants' Exhibit 4 handed witness.) [125] I signed this check on the Washington-Alaska bank dated September 21, 1910, made to the order of Fred Craig for \$225. It was my money that paid that check. I got it from the payment of a note that Mr. Patterson and Mr. Hosler had given me in the Dawson country for money loaned to them. (Defendants' Exhibit 1 handed witness.) That is the note I have just referred to. The money I received for it was put in the Washington-Alaska bank to my credit. I received a pass-book for the deposit that was made to my credit. (Defendants' Exhibit 3 handed witness.) That is the pass-book that I received from the Washington-Alaska bank for the deposit made for me. That note was given for money loaned to Mr. Patterson and Mr. Hosler for mining operations on Eldorado or Bonanza creek. We were on Bonanza creek at the time the note was given and when I loaned the money; that is in the Yukon Territory. I staked a fractional placer mining claim between 45 and 46 below on Bonanza and this money that I loaned to Mr. Hosler and Mr. Patterson was from the royalty out of that claim, that fraction; Mr. Hosler and Mr. Patterson paid me royalty. The royalty that I received during the year 1905 was something over \$2,000; royalty that was paid by Mr. Hosler. I deposited the gold-dust that I received in

(Testimony of Mariam A. Patterson.)

the Bank of British North America. I received my royalties in dust. I received a pass-book issued by that bank to me. (Defendants' Exhibit 2 handed witness.) That is the pass-book which was issued to me by that bank. This shows that from September 2, 1905, to October 2, 1905, I deposited gold-dust to the amount of \$1,943; that I received from Mr. Hosler; that is not the total amount of gold-dust that I received. It was of this money that I received and deposited to my credit that I loaned the \$500 to Mr. Patterson and Mr. Hosler and took this note for it.

The pass-book Defendants' Exhibit 3 shows a deposit of \$300 on August 11, 1910, and one of \$475.98 on August 15, 1910; that money that was deposited to my credit was the money that Mr. Hosler and Mr. Patterson paid me on the note; the reason Mr. Hosler's amount is more than Mr. Patterson's is Mr. Hosler had at the time of sickness in his family borrowed various amounts from me, small amounts, and I had also done a little shopping for Mrs. Hosler, and in the settlement [126] these bills were all brought in. The check that I gave Fred Craig was for sinking the drill holes on the Daly bench. I came to pay for sinking those drill holes in this way. Mr. Patterson said he believed he would go to town and see if he could get a half interest in the Daly bench from Judge Wickersham for sinking some holes or doing some assessment work on the Daly bench; Judge Wickersham did not consent to give him a half interest but told him he would give him a quarter interest and a 75% lay; then as he had only a very

(Testimony of Mariam A. Patterson.)

little money himself and he wanted to use that for working purposes, for mining purposes, he told me that if I would pay for the sinking of the holes, do the work necessary to acquire the quarter interest, that he would give it to me, give me the quarter interest; so I consented. At that time he thought this work would cost \$250 or \$300, because he thought it was wet ground and I was willing to take the chances and told my husband so. Then he made the arrangements with the drill men to go to work up there; I didn't go up there, I didn't see the holes; I only know what drilling they did from what Mr. Patterson told me. After they sunk the first hole they were not sure that that had reached bedrock, so Mr. Patterson talked it over with me and I consented to pay for the sinking of another one. We thought the quarter interest, if there was anything in it at all, would be cheap at that. Those drill holes were sunk just a few days before the date of the check September 21, 1910; around the 18th or 19th I should judge; I can't be positive about that. After I had paid for doing this work I asked Mr. Patterson that when he got the deed, or went to Judge Wickersham to get the deed, to be sure and have it made out to me in my name. He said, "All right," but he didn't get the deed then because Judge Wickersham went out. Later when he got the deed I asked him to be sure and have it made out in my name. After he got to town he 'phoned that the judge wasn't willing to make the deed in my name; he was perfectly willing to give him a deed to the quarter interest, but since he had



(Testimony of Mariam A. Patterson.)

had all of his dealings with Mr. Patterson he preferred to continue to have his dealings with him. After I found that Mr. Patterson had received the deed from Judge [127] Wickersham I was very much disappointed and I asked him to have it transferred to me. Every time he went to town I would ask him if he had that deed made out to me, but I think he had only been to town once after that before he did deed it to me; he was so busy at the time and had so many things to think of that I presume it slipped his mind. When he did make the deed to me, after he signed it, it was left here to be put on record, with Guy Erwin; afterwards Mr. Patterson delivered the deed to me, soon after he got it back, probably a week, I don't remember just exactly the number of days. I didn't pay anything for the deed when I got it from Mr. Patterson; I didn't buy the property from him; I regarded myself as entitled to have the deed to the quarter interest in the Daly bench because I had fulfilled my part of our contract in paying for the work necessary to acquire the quarter interest; I always considered it mine, looked upon it as mine and spoke of it as mine. Judge Wickersham never objected to my being the owner of the quarter interest after he knew that the deed to the quarter interest had been made to me. He never stated to me that Mr. Patterson was forbidden from conveying that quarter interest to me.

Q. This lease that Mr. Wickersham subsequently made to Mr. Patterson, that is, the second lease, did you see that document before it was executed?



(Testimony of Mariam A. Patterson.)

A. No.

Q. Did you know the contents of it?

A. No. Not until afterwards.

Q. This lease which Mr. Patterson made to Mr. Hamilton—did you see that at the time it was executed?     A. No, sir.

Q. Were you informed of what provision was made in that lease for the royalty that was to accrue to this quarter interest that you owned?

A. Only that Mr. Patterson told me that he had reserved five per cent for the quarter interest.

Q. Did you assent to that?     A. Yes. [128]

Afterwards I made a demand upon Mr. Hamilton while he was operating under that lease for my royalty. I was present at the first cleanup and after he had weighed out Judge Wickersham's royalty and I saw that he was preparing to pour all the rest into a poke I said, "Mr. Hamilton, where is my share?" and then he told me that an injunction had been served and he had been instructed not to pay it to me but to pay it into court until the question of the ownership was decided. Mrs. Hamilton was present at the time. I am not sure, but I think I was at all of the cleanups and helped clean some of the dust; Mr. Patterson was in attendance at the same time. Mr. Patterson made no demand at any of those cleanups for [129] royalty from Mr. Hamilton or from the Smith Brothers for himself that I know of.

At the time that I received this deed from Mr. Patterson it was certainly not my intention in accepting that deed to hinder, delay or defraud any credi-

(Testimony of Mariam A. Patterson.)

tors of Mr. Patterson. I accepted that deed because I thought I was entitled to it; I was entitled to it because I had paid out my money for the work necessary to acquire it; from the time I gave Mr. Craig the check I considered that I was the owner of the quarter interest. I am sure it was not Mr. Patterson's intention at the time he gave me this deed to hinder, delay or defraud any of his creditors. I never heard Mr. Patterson state to any other person that he was the owner of this quarter interest in the Daly bench; I don't remember of ever hearing him claim the quarter interest in my presence. I certainly did not hear him say to John Junkin and a person by the name of Mosier shortly after they quit operations on the Tolbert bench that the quarter interest in the Daly bench belonged to him, or I would have corrected it; I would have said that it belonged to me. They may have had that meeting in my cabin but if they did I didn't pay any attention to what was being said. I don't remember of saying at any time to any person that my husband was the owner of this quarter interest in the Daly bench; if I had done so I would be pretty likely to remember it. I always spoke of that quarter interest as mine and generally referred to me and my partner Judge Wickersham. I told those persons that this quarter interest belonged to me but I can't recall the name or names of any person that I told; I think I know but I won't be sure. [130]

(Testimony of Mariam A. Patterson.)

Cross-examination.

(By Mr. CLARK.)

Q. You say you always spoke of the property as your property, did you, Mrs. Patterson? A. I did.

Q. Can you remember who you spoke to and called it your property?

A. No. As I said before, I can't remember the exact person.

Q. And you have no recollection of any person?

A. I think I know. But then there is no use saying who it is when I am not positive.

Q. And you are certain that you always spoke of it as your property? A. Yes.

Q. And "Me and my partner Judge Wickersham."

A. Yes.

Q. And you don't think that you ever spoke of it in any other way after the hole had been put down and you would be entitled to a deed, as you contend?

A. I don't think so. I might have said "our" or "we," as married people have a habit of doing that.

Q. You were called to testify in the case of E. R. Peoples vs. Mariam A. Patterson and H. J. Patterson, a suit pending in this court, numbered 1748. Your deposition was taken before Mr. E. T. Wolcott on March 16, 1912, you being represented by your attorney Mr. A. R. Heilig. Do you remember the time your deposition was taken? A. Yes, sir.

Q. Do you remember of these questions being asked you and these answers given. (Reads:)

"Q. Did you not, during this last summer and fall prior to the time Mr. Patterson quit work on [131]

(Testimony of Mariam A. Patterson.)

Engineer Creek, in speaking of that property to various of your friends speak of it as Harry's ground?     A. No.

Q. You are certain of that?

A. Harry had the lay and I owned the ground.

Q. Didn't you, during the time I have mentioned, and prior to the 27th of November, 1911, continually, in talking with some of your friends, speak of that ground as the ground that Harry owned on Ester Creek?

A. No. I always said 'we,' 'our ground on Ester.'

Q. You didn't speak of it as your ground?

A. Because he had the lay and I had the interest, so I said 'we.' "

Is that what you meant to-day when you said you always spoke of it as "My ground," and "Me and my partner, Judge Wickersham"?

A. Well, I admitted that I may have said "our" and "we." I can't remember. It is so long ago.

Q. That was during the spring and summer of 1911 that you spoke of the ground, wasn't it?     A. 1911?

Q. Yes. The holes were sunk in 1910, and that was during that winter and the next spring, was it, that you spoke of it?     A. I presume so.

Q. In here you say you spoke of it as "we" because he had the lay and you had the ground. That was correct, was it?     A. Yes.

Q. After those drill holes were sunk, Mr. Patterson didn't do any work on the ground in the way of carrying out the provisions of his lease, did he?

A. I believe not.



(Testimony of Mariam A. Patterson.)

Q. You knew he was supposed to file the proof of annual labor after the drill holes were sunk, didn't you? A. I didn't think much about it. [132]

Q. You know he never did any work on the ground under that lay? A. I don't think he did.

Q. And you knew he abandoned the lay, had never done a particle of work under it? A. Yes.

Q. You knew, under the terms of the lay he was supposed to commence work within a reasonable time and work continuously under the lay?

A. I believe that is what it says.

Q. And you knew he was not working under that lay. A. Yes.

Q. Then how did Mr. Patterson, several months after, during the spring and summer of the next year—how did he have any lay on the ground, Mrs. Patterson, so that you could speak of it as "our ground," because Harry had a lay on the ground and you owned the ground?

A. I don't know much about those things, Mr. Clark. I just supposed the lay was still in existence until the second was made out. I don't know.

Q. You knew that Mr. Patterson never intended to do any work under it—(interrupted).

A. No.

Q. After the two holes were put down.

A. No. I didn't know what his intentions were, Mr. Clark.

Q. When that sub-lay was made to Henry Hamilton, was your consent asked at that time in regard to transferring that lay? A. No. Well, I don't—



(Testimony of Mariam A. Patterson.)

Q. You stated a while ago that you discussed the sub-lay. [133]

A. Yes. We did talk it over.

Q. And that you consented to it.

A. Yes. I presume I did say when my deposition was taken at the time you referred to that I did not have anything to do with the gold produced after the lease was assigned over to Mr. Hamilton and that my consent was not asked at the time of the assignment to the lay to him.

I repeatedly demanded that Mr. Patterson make out a deed to me from the very beginning. I presume I did say when my deposition was taken that I did not at any time between the time that written agreement was entered into between Judge Wickersham and Mr. Patterson ask Mr. Patterson for a deed to the property, of his interest in the Daly bench; Judge Wickersham went right out that night or the next morning after he gave the lease. At the same time I testified that I did not ask him to execute that deed to me on the 27th of November, that I didn't remember when he first told me that he had executed the deed, but I suppose when he came home as soon as it was done, that he didn't tell me why he had executed it. I also testified then that from the year 1910 at the time the assessment work was done on this ground up until the time the deed was made. [134] I could not tell the name of any person to whom I had said that I had an interest in that property, that I didn't remember who it was that I told, that it was several of my neighbors there at Esther, I told them

(Testimony of Mariam A. Patterson.)

that I owned the interest; that during the Summer and Fall of 1911 I was living part of the time on Engineer creek; that I moved from Esther the last day of February, 1911.

At the time Mr. Patterson gave this deed to me on the 27th of November, 1911, he had been working on Engineer creek for some considerable period, I don't know just how long. Necessarily I knew that he was owing a great deal of money from those mining operations. I didn't know much about his troubles with his creditors. He told me that Mr. Peoples wanted him to pay more and more every week; and I knew that the bank had taken the last cleanup and refused to let him draw any checks against it, Mr. Patterson told me that. I didn't know anything about the thousand dollar check until a good while after; I couldn't say how long after this deed was made to me that I first learned or heard about that check, it is too long ago for me to remember. I have a faint recollection, nothing definite, of Mr. Patterson speaking to me about giving security on that quarter interest to secure Mr. Bruning or Mr. Peoples on account of that check being turned down, but I couldn't say whether that was or was not the time when I learned about this thousand dollar check I knew of the occurrence sometime.

I don't remember whether Mr. Patterson informed me at the time when I first spoke about doing the assessment work out there how much he was to do to acquire the interest in the ground; he told me if I would pay for the work I could have the quarter in-

(Testimony of Mariam A. Patterson.)

terest. We thought that it would cost between \$250 and \$300. In my examination before Mr. Wolcott above referred to I testified that I purchased the property from Judge Wickersham in 1910 by paying for the representation work; that that was the consideration of the acquiring of that quarter interest in that property, the sole consideration. I don't know whether Judge Wickersham knew right at the time the work was being done that I was going to pay for it, but he knew [135] after that that I had paid for it; he knew it when Mr. Patterson went to him to get the deed. I never talked to Judge Wickersham personally about the matter; I never asked him for a deed to the property.

About the time that Mr. Patterson gave me this deed I knew that he assigned his lay on Last Chance claim over to a lot of workmen that were out there, and that a suit had been instituted and a receiver appointed.

Q. You stated a moment ago, in answer to a direct interrogatory by Mr. Heilig, that Mr. Patterson told you about the sublease to Mr. Hamilton, and that he had reserved five per cent of the gross output to the one-quarter interest, and that you assented to that. That is correct, is it?

A. As near as I can remember. Yes.

Q. You knew that Mr. Patterson was having trouble with his various creditors at the time this deed was executed, didn't you?

A. Why, in a general way I knew something about his business, but he never was much of a hand to talk

(Testimony of Mariam A. Patterson.)

about his business to me, and I really didn't know very much about it, Mr. Clark.

Q. Did you know anything about a compromise agreement that was effected out there with the Happy Home people?     A. Yes, sir.

Q. Did you know the details of that at the time?

A. No, I didn't know just what the details were, except as Mr. Patterson had told me.

Q. Did he tell you at that time?

A. Of the various offers that were made.

Q. Did he tell you at that time what the final agreement was?

A. Yes. I knew what the final agreement was.

Q. When did you first learn what that final agreement was?

A. I don't know. I can't remember that. I can't remember dates.

Q. Did you know, at the time the compromise was effected, [136] what was done?

A. I knew what the last proposition was; that they would take seventy-five feet of the claim. And George Smith called up on the phone for Mr. Patterson, and Mr. Patterson was not at the house, and I was talking with him, and he told me what the last proposition was, and I said, "Well, I am not in favor of giving them any, because I think they are just bluffing." Of course, Mr. Patterson and Judge Wickersham thought, to avoid trouble, they would rather give up that much.

Q. Were these questions asked of you and these



(Testimony of Mariam A. Patterson.)

answers given in your former examination?

(Reads:)

“Q. A deed was executed by the people with whom you were in controversy to Mr. Wickersham, Mr. Patterson and others, wasn't there?

A. Beg pardon?

Q. A deed was executed by Wagner, Wheeler and his partners to Mr. Patterson and Judge Wickersham, was there not?

A. I don't know.”

Q. Were those questions asked of you and those answers given by you at that time when your deposition was taken?

A. I presume they were, as I didn't know of my own personal knowledge, only from hearsay.

#### On Redirect Examination.

From the time that I paid the purchase price for this quarter interest I regarded myself as the owner of the property, yet I permitted my husband to sign his name to instruments offered in evidence here in which it is stated that he is the owner of the property because Mr. Patterson had always attended to my business affairs, of course, he always consulted me and advised me and then he went ahead and attended to them himself. I don't think I ever saw what they call the compromise agreement just shown me by Mr. Clark; I knew the basis upon which the compromise was made. I at first [137] objected to that, but finally agreed, to settle the difficulty. I did not see the compromise agreement nor the deed from Wickersham to Mr. Patterson nor the lease from



(Testimony of Mariam A. Patterson.)

Wickersham to Mr. Patterson before they were recorded. I presume I saw them after they were recorded but I didn't pay much attention to them; I may not even have read them over. After I had paid the purchase price for this quarter interest my husband never at any time contended with me that the quarter interest belonged to him instead of to me.

**Testimony of D. G. Hosler, for Defendant.**

D. G. HOSLER, a witness for defendants, testified:

The D in my name stands for Delbert; I have been rather intimately acquainted with H. J. Patterson and Mariam A. Patterson, his wife, for a number of years. They frequently addressed me as "Del." I became acquainted with Mr. Patterson in 1901 on Chechaco Hill on Bonanza in the Yukon Territory. We went into partnership on a lay there; that partnership in the Yukon Territory continued until they came to Fairbanks district; I can tell when that was by the note I gave to Mrs. Patterson on Eldorado, that Patterson and I gave her. (Paper shown witness.) That is the note that Mr. Patterson and I gave Mrs. Patterson; that is my signature appearing on the paper, and that is Mr. Patterson's signature appearing on the paper. (Note marked Defendants' Exhibit 1.) On October 19, 1905, I was partner with Mr. Patterson; we mined on Eldorado, and lived close together, probably 300 yards. Mr. Patterson and I gave that note to Mrs. Patterson for money; we needed the money and we borrowed it from her and gave her the note, borrowed five hundred dollars, the amount that the note shows. I worked a fraction

(Testimony of D. G. Hosler.)

that she owned on Bonanza, between 45 and 46, Mr. Patterson was partner with me. I turned the royalty over to Mrs. Patterson; it was her ground; that claim was staked in Mrs. Patterson's name, her name was on the stakes. I didn't see her stake the ground; the papers were made out for the lay in the name of Mrs. Patterson. I saw surveyor Green working there, putting up the stakes and I think he was surveying this ground. I don't remember definitely the royalty that I paid but I think it was 70% that we received and she received 30%; I paid her the royalty in the customary way; [138] She was usually present at each cleanup and received her royalty just as we weighed the dust; she took her royalty at that time. I can state only approximately the amount of royalty I paid her during that summer; the smallest sum I can be positive of would be \$1,800, and I should say the largest sum would be \$2,500; it is between those sums. I am positive it was \$1,800 or over that I paid her in royalty; this royalty was paid to her before the giving of that note. The note was subsequently paid on Esther creek in the Fairbanks precinct; I subsequently came there in 1909. Mr. Patterson and I were interested in the Ready Bullion Mining Company on Ready Bullion, a tributary of Esther, in operations there; those operations were profitable; I should think Mr. Patterson's profits there were between \$3,000 and \$4,000, but that might be quite a ways off, it might be off a thousand dollars either way. I should say he made a profit of between \$3,000 and \$5,000. I was intimately acquainted with

(Testimony of D. G. Hosler.)

them while I was working on Esther creek. I understood that he paid his debts from that and was clear. I don't know anything positively about Mrs. Patterson's being the real owner of a quarter interest in the Daly bench but I had an impression that was created by my intercourse with Mr. and Mrs. Patterson, a very strong impression, that she had drilled this ground, paid for the drilling of this ground to receive her quarter interest and supposed that she had received her quarter interest directly afterward. I think I went down to Hot Springs in the latter part of September 1910.

Cross-examination.

(By Mr. CLARK.)

Q. You say you went down to Hot Springs in the fall of 1910.

A. I said I thought it was that time. I think it was in 1910.

Q. What month?

A. September. That is, I went down to stay at that time. Before that time I had been down I think it was in August to look over the camp.

Q. You have been down there permanently since that time. A. Yes, sir.

Q. Don't you know, Mr. Hosler, that the original contract between Mr. Patterson and Mr. Wickersham relative to [139] acquiring an interest in that ground wasn't signed up until the 21st day of September, 1910?

A. No, sir. I don't know anything about that.

Q. Then, if you left in September, 1910, and the

(Testimony of D. G. Hosler.)

work wasn't done until after that time, you were not here at any time after that work was done?

A. I think the work was done. I was under the strong impression that the work was done before the latter part of September, 1910.

Q. You are not certain of that?

A. No, I am not certain of that, but I don't—  
(interrupted).

Q. What date did you leave here in September?

A. I can't state that. I could find it out.

Q. Can you tell us about what date?

A. It was the latter part of September.

Q. By "the latter part" what do you mean?

A. From the 20th to the 30th. I think it was between the 20th and the 30th. I didn't have that note in my possession for any length of time since it was originally signed by me; I might have had it in my hands, if I did it was at the time I paid it. I don't know whether I had it in my possession at that time or not; I saw the note at that time, I remember that distinctly but I couldn't say that I had it in my hand. I couldn't tell you how much I paid although I think I paid half of the note. If you would let me I would tell you how that settlement took place. [140]

#### On Redirect Examination.

I had gotten the impression that Mrs. Patterson had acquired that quarter interest before I went down to Hot Springs; at the time I got this impression formed the drill holes had been drilled and I understood she had a quarter interest, but as far as



(Testimony of D. G. Hosler.)

dates are concerned that far back, I am not very good on dates.

**On Recross-examination.**

I don't remember Mr. Patterson paying his part of that note. I couldn't say whether he and I paid this note at the same time. I paid my part in a settlement, I think it was in cash. I owed Mrs. Patterson a few dollars, which I can't remember the amount, but I know there was some money I had borrowed from her that I owed her besides this note, but I don't remember the amount, and I can't remember whether I paid her in check or in currency, but I think I paid her in currency because if I hadn't I would have noticed on my bank stubs. The money to Mrs. Patterson was turned over to her; this settlement took place at their residence at Esther city. I think that the note was present but I don't think that I asked for it; in fact I know then one was present, but I don't know whether I asked for it or not, I don't hardly think I did. I think Mrs. Patterson produced the note. I couldn't say that I had it in my hand; I remember seeing the note. I paid Mrs. Patterson my share of the note and some other amount that I owed her, cash that I had borrowed from her before.

**Testimony of John Junkin, for Plaintiff (in Rebuttal).**

Thereupon JOHN JUNKIN, a witness for plaintiff, in rebuttal, testified:

Shortly after New Years day 1911, at the Golden Gate hotel I had a conversation with Harry Patterson in which I asked him if he had gone to work on his



(Testimony of John Junkin.)

Eva creek property and he said, "No, not yet; I am investigating some property on Engineer and if the deal does not go through I will try my Eva creek property."

On Last Chance Association claim on Engineer creek in the early part of the summer of 1911 at a time when the report of the Horner strike on the Happy Home had been made public I had a conversation with H. J. Patterson in the boiler-house *I* which he told [141] me reminded me that he owned a quarter interest in the Daly bench and said that the pay was sure to run through the bench from all indications and from the way it was lined up.

After Mr. Patterson had closed down his operations on the Last Chance Association claim and Mr. McDonald had been appointed as trustee to work the ground, I had the following conversation with Mr. McDonald and Mr. Patterson—Mr. McDonald said, "I tried to get Harry to go to work as foreman underground but he wouldn't," and I then turned to Harry and asked him why he didn't help the boys out, to which Harry said, "I am done with it, and never want to see the Last Chance again."

**Testimony of A. Bruning, for Plaintiff (in Rebuttal).**

Thereupon A. BRUNING, a witness for plaintiff, in rebuttal, testified:

With regard to Mr. Patterson's testimony that Mr. Erchinger and I were instrumental in getting him to take over the Last Chance lay my recollection of the matter is this; that Mr. Erchinger thought that Mr. Patterson after his experience on Ready Bullion

(Testimony of A. Bruning.)

working in wet ground probably would be a good man to get to work on Engineer creek and I told him if they could get a good man as far as I knew of the ground if a man knew how to handle the ground he could make some money. My recollection is that Erchinger brought Mr. Patterson to me and asked me to use my influence, or if there was any chance for him to get the lay to get the lay for him.

Originally Mr. Patterson thought that it wouldn't take more than \$1,000 until he got the hole down to bedrock and as soon as he got this hole down he figured that the tunnel dirt would pay the operating expenses from that on. I did not agree to advance him any definite sum of money; that advancement was made by myself personally because I felt that owing to the debt he owed the bank, the original note, that as an officer of the bank I had no right to give him any more advances. From my dealings with him the previous year while he was in partnership with Tolbert I thought I was perfectly justified in taking a chance, and did, to back him or advance him the money until he was able to handle it himself. I don't know exactly the total amount he had used before he got through drawing on me [142] but I think he gave me a note for \$2,900. If that was actual cash advanced or cash advanced with the interest I have no recollection. The bank had made no agreement with him that they would cash all checks that were presented regardless of whether there was any money in the bank to cover. Regarding his testimony that it put him out very much because he said the bank

(Testimony of A. Bruning.)

seized the last \$5,500 cleanup that came in, there was no agreement with regard to the payment of checks until that cleanup came in or anything of that kind. At the time he was pretty heavily overdrawn and I wasn't going to cash any more checks until the cleanup got in. I cashed only a ten dollar check that day the cleanup came in. The bank had no agreement with him to supply him with an indefinite amount.

Testimony closed.

The foregoing, from page 1 to page 97, includes in narrative and condensed form all the testimony, evidence and exhibits given, offered, admitted and used upon the trial of the above-entitled cause in support of and against the allegations and denials of the complaint, answers and replies relative to the claim of plaintiff and defendants respectively to the fund of \$5,174.66 in the registry of the court, said claim being the only matter presented by this appeal.

That after the plaintiff and defendants had rested, the said cause was argued by the respective attorneys and the same submitted to the Court for consideration and decision, and thereafter, and before the findings of fact and conclusions of law had been made and signed by the Court and filed with the clerk thereof, said defendants requested the Court to make the following Findings of Fact and conclusions of law, to wit: [143]

[Title of Court and Cause.]

**Defendants' Requests for Findings of Fact and  
Conclusions of Law.**

Come now the defendants and request the Court, upon the evidence adduced upon the trial of this action, to make the following findings of fact:

1. That on the 19th day of September, 1910, James Wickersham was the sole owner of placer mining claim known as the Daly Bench situate on Esther Creek, in the Fairbanks Recording District, Alaska, and on said date entered into an agreement with H. J. Patterson whereby he agreed to convey to said H. J. Patterson an undivided quarter interest in said claim if said Patterson would at his own expense cause to be sunk a hole to bedrock upon said claim and the assessment work for the year 1910 to be done thereon.

2. That thereafter, but on the same day, the said H. J. Patterson agreed with Mariam A. Patterson that if she would pay the expense of sinking said hole to bedrock and doing said assessment work, with her own money, she should receive and be the owner of the title to said quarter interest; that at the time of said agreement he represented to her that the estimated expense was from \$250 to \$300.

3. That Mariam A. Patterson agreed to do so and at her expense one hole was sunk on said claim on September 20, 1910, with a steam drill to the depth of 103 feet, but the driller was doubtful whether the hole had reached bedrock and was unable to sink



said hole deeper after withdrawing the drill-bit, it being thawed ground and no casing being used, whereupon on the day following at her instance another hole was sunk on said claim to the depth of 123 feet which reached bedrock; that the sinking of said two holes constituted the doing of the assessment work for the year 1910.

4. That on September 21, 1910, Mariam A. Patterson paid to the driller \$225 for sinking said holes; that the money so paid by her was part of her own funds which she had at that time and prior thereto in deposit in bank in her own name, and which money was her sole and separate property in which her husband H. J. Patterson had no interest nor right to whatever;

5. That before said work was completed said Wickersham left Fairbanks on his way to Washington, D. C. he being the delegate in Congress from Alaska, whence he did not return until September, 1911;

6. That after said Wickersham's return to Fairbanks, said H. J. Patterson satisfied him that the work required by said agreement had been performed, and informed him that it had been done at Mariam A. Patterson's expense, and requested Wickersham to make the deed of said quarter interest to Mariam A. Patterson;

7. That on October 14, 1911, Wickersham executed a deed for said quarter interest, and without the knowledge or consent of Mariam A. Patterson named [144] H. J. Patterson as grantee therein, and delivered said deed to him on November 10,



1911, and at the same time consented that H. J. Patterson convey said quarter interest to Mariam A. Patterson.

8. That as soon as Mariam A. Patterson learned that said deed had been executed by Wickersham she demanded that H. J. Patterson convey said quarter interest to her, which said H. J. Patterson promised to do, and after repeated demands by her said H. J. Patterson did convey said quarter interest to her by quitclaim deed dated and executed November 27, 1911, and which was delivered to her a week later.

9. That the real consideration of the deed from H. J. Patterson to Mariam A. Patterson was the payment by the latter of the expense of sinking said hole to bedrock and doing the assessment work for the year 1910 with her own money, and the performance of his said promise made on September 19, 1910.

10. That the deed from H. J. Patterson to Mariam A. Patterson was made by him and received by her, in good faith, for a valuable and sufficient consideration, and without any design on the part of either of them to hinder, delay or defraud any creditor of the said H. J. Patterson.

11. That by lease dated October 12, 1911, and delivered to said H. J. Patterson on November 10, 1911, said Wickersham, without the knowledge or consent of Mariam A. Patterson, leased to said H. J. Patterson the whole of said mining claim, reserving to the said Wickersham as royalty for his interest therein 25% of the gross output of gold pro-

duced in any mining operations thereunder; that on January 29, 1912, and before any gold had been extracted from said mining claim, under said lease, and when the assignee of said lease threatened to cease mining operations, because of the apparent small content of placer gold therein, said Wickersham reduced the royalty reserved by him for his interest therein to 20% of the gross output.

12. That H. J. Patterson did not do any mining under said lease on the Daly Bench. In February 1911, he had commenced mining operations upon the Last Chance association claim on Engineer creek distant about 12 miles from said Daly Bench, which operations were unsuccessful so that he became indebted upwards of \$30,000; that all the claims of the creditors represented by the plaintiff as trustee in bankruptcy arose from the mining operations carried on on said Last Chance association claim, and not from any mining operations carried on on the Daly Bench.

13. That on November 27, 1911, but prior to the execution and delivery of said deed, from H. J. Patterson to Mariam A. Patterson of said quarter interest, the said H. J. Patterson found himself unable to carry on mining operations on the Daly Bench under the lease from Wickersham, whereupon, with the consent of said Wickersham he assigned said lease to H. C. Hamilton, without receiving or being promised any consideration therefor, and without reserving any interest therein to himself; that at the same time and by the same instru-

ment he leased to the said H. C. Hamilton the quarter interest conveyed by Wickersham, the legal title to which was then standing in his name, and reserved for said quarter interest a rent or royalty of 5% of the gross output to be produced by said Hamilton in his mining operations; that at said time no gold had been extracted from said ground and no rent or royalty had accrued.

14. That said lease to Hamilton of said quarter interest was made without the knowledge or consent of Mariam A. Patterson, but prior to the extraction of [145] any gold from said ground she assented to taking 5% of the gross output as rent or royalty for her quarter interest in said claim.

15. That at the time of the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson no gold had been extracted from said ground and no rent or royalty had accrued; that the first cleanup of gold thereon was made in May, 1912, by said Hamilton.

16. That at said first cleanup of gold said Mariam A. Patterson was present and demanded from said Hamilton 5% of the gross amount thereof as royalty for her quarter interest, which said Hamilton would have given her then and there had he not been enjoined by order of Court in this action from doing so; instead of giving it to her, pursuant to the same order, he deposited at each cleanup 5% of the total amount produced by him and his partners on said claim in court; that the total amount of gold-dust so deposited by him in court, which has been

converted into money, is \$5174.66, which fund is still in the registry of this court.

17. That said H. J. Patterson at no time demanded any part of the output of said claim, and at no time has he claimed to be entitled to receive any part thereof, since he executed and delivered to Mariam A. Patterson a deed to said quarter interest.

18. That after H. J. Patterson had assigned the Wickersham lease to Hamilton, the latter, with the knowledge and consent of Wickersham, sublet a strip of said claim 250 feet in width to the Smith Brothers; that thereafter, but prior to January 1, 1912, said H. J. Patterson agreed with the Smith Brothers that he would assist them financially in their mining operations, and as compensation therefor they agreed that said H. J. Patterson should receive 5% of the gross output produced by them in mining on said strip; that after assisting them to the extent of \$1,400 said H. J. Patterson found himself unable to perform his part of the agreement and thereupon it was mutually agreed that said contract was annulled, and said H. J. Patterson thereupon relinquished all claim to any part of their output; that thereupon said H. C. Hamilton entered into partnership with said Smith Brothers, and financed their mining operations and mined said strip; that after the annulment of said agreement between the Smith Brothers and H. J. Patterson, the latter made no further claim to any part of the output of gold produced by any mining operations upon said ground;



that at the time said agreement was annulled no gold had been extracted from said ground.

19. That neither Mariam A. Patterson nor H. J. Patterson have received any part of the gold mined upon said Daly Bench by Hamilton and his partners or by any other person, nor has any rent or royalty been paid to them or either of them. [146]

From which facts so found, and the pleadings in the case, the Court is requested to make the following conclusions of law:

1. That the purchase of the quarter interest in the Daly Bench was the payment of the expense of sinking a hole to bedrock and doing the assessment work thereon for the year 1910.

2. That when, on September 21, 1910, Mariam A. Patterson paid said purchase price she became, and ever since has been, the real beneficial and equitable owner of said quarter interest.

3. That when, on November 10, 1911, H. J. Patterson received the legal title to said quarter interest by deed from Wickersham without the knowledge or consent of Mariam A. Patterson, a resulting trust arose in favor of Mariam A. Patterson and thereafter he held the bare legal title thereto in trust for Mariam A. Patterson.

4. That the deed dated November 27, 1911, from H. J. Patterson to Mariam A. Patterson of said quarter interest was made for a valuable and sufficient consideration and was not in fraud of creditors and is valid.

5. That the deed from H. J. Patterson to Mariam A. Patterson dated November 27, 1911, was not a



voluntary conveyance nor fraudulent as to creditors of H. J. Patterson, and was made for a valuable and sufficient consideration.

6. That the parol agreement between H. J. Patterson and Mariam A. Patterson that if the latter would pay the expense of sinking a hole to bedrock and doing the assessment work thereon for the year 1910 with her own money she should have the title to the quarter interest, was validated by performance in the execution and delivery of said deed by him to her.

7. That the \$225 paid by Mariam A. Patterson as the purchase price of said quarter interest was her own sole and separate property.

8. That when Wickersham executed and delivered a deed of said quarter interest to H. J. Patterson, the effect thereof was to merge *pro tanto* the leasehold estate held by H. J. Patterson in said claim, in the fee of the quarter interest, and to extinguish relationship of lessor and lessee theretofore existing between Wickersham and H. J. Patterson so far as said quarter interest was concerned, and thereafter H. J. Patterson had a lease of Wickersham's three-quarter interest, and held the remaining quarter interest as owner of the legal title thereto.

9. That when H. J. Patterson executed and delivered to Mariam A. Patterson a deed to the quarter interest, the latter became entitled to all rents and royalties reserved to said quarter interest in the lease from H. J. Patterson to H. C. Hamilton, accruing subsequent to the delivery of said deed.

10. That Mariam A. Patterson was a bona fide holder of said quarter interest for value prior to the date of the adjudication of H. J. Patterson as a bankrupt.

11. That Mariam A. Patterson at the time of the commencement of this action and prior thereto was, and now is, the legal and equitable owner of the quarter interest in the Daly Bench which was conveyed by Wickersham to H. J. Patterson, and by the latter to her. [147]

12. That Mariam A. Patterson is entitled to receive the fund of \$5,174.66, now in the registry of this court, it being 5% of the gross output of gold produced by H. C. Hamilton and his partners in mining upon said Daly Bench under the lease of said quarter interest made to him by H. J. Patterson prior to the conveyance of the legal title thereto to Mariam A. Patterson, and that all of said royalty accrued after the making and delivery of said conveyance.

13. That defendants are entitled to judgment that plaintiff's action be dismissed.

Filed May 17, 1916.

A. R. HEILIG,  
Atty. for Defendants.

And said plaintiff, before the Findings of Fact and Conclusions of Law had been made and signed by the Court and filed with the clerk thereof, requested the Court to make the following findings of fact and conclusions of law, to wit: [148]

[Title of Court and Cause.]

**Plaintiff's Proposed Findings of Fact and  
Conclusions of Law.**

The above-entitled cause coming on regularly for trial on the — day of April, 1916, the plaintiff appearing in person and by and through his attorneys, Messrs. McGowan & Clark and Mr. Harry E. Pratt, and the defendants appearing in person and by and through their attorney, Mr. A. R. Heilig, and both sides having announced themselves ready for trial, and the trial having thereupon proceeded, and oral and documentary evidence having been introduced for and on behalf of both plaintiff and defendants, and the matter having been fully argued by counsel for the respective parties and having been submitted to this Court for decision, and the Court having thereafter and on the 15th day of May, 1916, announced its decision in said matter.

Now, therefore, in pursuance thereof, the Court does now find and establish the following as its findings of fact and conclusions of law in said cause, to wit:

**FINDINGS OF FACT.**

(1) That on and prior to the 19th day of September, 1910, James Wickersham was the owner in fee, subject only to the paramount title of the United States, in possession of, and entitled to the possession of that certain placer mining claim, known as the Daly Bench, situate on the left limit of Esther Creek, in the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska,

and that on or about said date said James Wickersham entered into a written agreement with H. J. Patterson, whereby said Wickersham agreed to convey to said H. J. Patterson an undivided one-quarter interest in and to said mining claim if said H. J. Patterson would, at his own expense, sink one hole to bedrock on said claim and do the assessment work thereon for the year 1910, which said agreement was coupled with a lease of the whole of said [149] premises.

(2) That thereafter said H. J. Patterson entered into an oral agreement with his wife, Mariam A. Patterson, one of the defendants herein, whereby said Mariam A. Patterson, in consideration of advancing the money necessary to fulfill the terms of said agreement with said Wickersham relative to acquiring a one-quarter interest in said ground, should be the owner of a one-quarter interest when title was acquired thereto, and said Mariam A. Patterson paid and advanced to said H. J. Patterson the sum of \$225, which sum was the sum necessary to be paid for causing two drill-holes to be sunk to bedrock on said ground, said work being performed in the month of September, 1910.

(3) That thereafter the defendant H. J. Patterson abandoned said lease and did no work thereunder, and subsequent to said abandonment of said lease by said H. J. Patterson a controversy arose between the stakers of the Happy Home Association claim, adjoining said Daly Bench, and the owners of said Daly Bench, relative to the ownership of the greater portion of said Daly Bench, and said



matters so in controversy were settled and adjusted between said parties on the 8th day of November, 1911, and said James Wickersham and H. J. Patterson, for the purpose of compromising said dispute, assigned and transferred to the owners of said Happy Home Association claim and their lessees a strip of ground 75 feet in width, off of the upper end of the Daly Bench, running up and down the general course of Esther Creek and parallel to the northerly line of said claim.

(4) That prior to the settlement of said controversy last referred to and on or about the 14th day of October, 1911, James Wickersham made and executed a deed to H. J. Patterson for an undivided one-quarter interest in and to said Daly Bench hereinbefore referred to, for the recited consideration of one dollar and in consideration of the doing of the assessment work thereon by the vendee for the year 1910, in compliance with the United States statutes, which said deed was delivered to said H. J. Patterson subsequent to the 8th day of November, 1911, and was by him duly filed for record on the 10th day of November, 1911, in office of the recorder of the Fairbanks Mining and Recording Precinct, Territory of Alaska.

(5) That prior to the execution of said deed by said James Wickersham to H. J. Patterson, as set forth in finding No. 4 hereof, and on the 12th day [150] of October, 1911, said James Wickersham made, executed and delivered to said H. J. Patterson a lease covering all the Daly Bench placer mining claim, together with all appurtenances and the



right and privilege to prospect and mine the same and extract therefrom all the gold-bearing placers therein contained, subject to the following condition, to wit:

“As part consideration of this lease the party of the second part agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part and the performance of this lease.”

That the term of said lease, as therein provided, was from the date thereof until the 12th day of October, 1915, unless sooner determined or forfeited through failure on the part of the lessee to pay and deliver the rents and royalties agreed upon, or for other violations of the conditions thereof; said lease also provided, among other things, that the lessee, as royalties and rentals, should pay and deliver to the lessor therein 25 per cent or one-quarter of the gross amount of each and every cleanup at the

time the same was finished; and also contained the following provision, to wit:

“And it is of the essence of this contract, and the party of the second part hereby specially agrees to pay and to deliver to the party of the first part, or to his duly authorized agent, in consideration of this lease, as the share, royalty and rental of the party of the first part twenty-five (25 per cent) per cent, or a full one-fourth of the gross amount of all gold-dust and other mineral extracted, mined, taken or produced from the whole of the said premises during the whole of the term of this lease or lay, and agrees to pay and deliver said one-fourth part of the said gross output of the whole of the said mining claim to the said party of the first part, or his duly authorized agent, immediately upon and after each cleanup is so made, without delay or default for any reason whatever.”

Said lease also recited that James Wickersham, the lessor therein named, was the owner of an undivided three-quarters interest in and to the property covered by said lease, and H. J. Patterson, the lessee, the owner of an undivided one-fourth thereof, and said lease was on the 10th day of November, 1911, filed for record in the office of the recorder of the Fairbanks Mining and Recording Precinct, Territory of Alaska, and recorded in volume 5 of Leases, at page 216 thereof.

(6) That thereafter and on the 29th day of January, 1912, the lessor therein [151] named consented that the share or royalty to be paid to said

lessor should be reduced from 25 per cent to 20 per cent of the gross output of the ground described in said lease, and that in all other respects the lease should remain in its original form.

(7) That subsequent to the execution of said lease from said Wickersham to said Patterson, of date of the 12th day of October, 1911, the said H. J. Patterson assigned said lease and the whole thereof to H. C. Hamilton, said assignment being in writing, and which said lease contained among other conditions the following paragraph:

“Now, therefore, this indenture witnesseth that the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining ground above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham and in his own right as owner of an undivided one-fourth part of the title to said mining claim, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915, upon the same terms, conditions and covenants and subject to the same terms and conditions as in said lease from James Wickersham to said H. J. Patterson set forth, excepting, however, that the said H. C. Hamilton shall pay as royalty and rental as such lessee twenty-five per cent of the gross amount of each and every cleanup of gold and gold-dust made by him upon said demises premises to the said James Wickersham, and shall pay in addition thereto five

per cent of the gross amount of each and every cleanup of gold and gold-dust made by him upon said premises to the said H. J. Patterson, but in all other respects the terms, covenants and conditions of said lease from Wickersham to Patterson shall be binding upon the said H. C. Hamilton with the same force and effect and to all intents and purposes as if he were a party named as lessee in said lease.”

Which said lease was duly executed in the manner prescribed by law, and said Hamilton thereupon entered upon said ground and commenced the prosecution of mining operations thereon.

(8) That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from Wickersham to H. J. Patterson of date of the 12th day of October, 1911, and knew the terms and conditions thereof, and had knowledge of and was fully informed of the terms and conditions of the assignment of said lease from said H. J. Patterson to said H. C. Hamilton on the 27th day of November, 1911, and assented thereto.

(9) That subsequent to the execution of said assignment to said H. C. Hamilton, but on the same day that said assignment was made, H. J. Patterson caused to be prepared and executed a deed in proper form to the defendant Mariam A. Patterson, his wife, wherein it is recited:

“That the party of the first part, for and in consideration of the [152] sum of one dollar, lawful money of the United States of America,



to him in hand paid by party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, and sold, conveyed, remised, released, and quitclaimed, and by these presents doth grant, bargain, sell, convey, remise, release, and forever quitclaim, unto the said party of the second part, her heirs and assigns, all of his right, title, and interest, being an undivided one-fourth interest of, in, and to that certain bench placer mining claim, situate in the Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly Bench Placer mining claim, being the second bench claim on the left limit and about opposite No. Three (3) creek claim above Discovery on said Ester Creek, and located by Pat Daly on December 1st, 1905, to have and to hold the same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever."

(10) That said H. J. Patterson did not at any time assign, transfer, or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton, wherein said H. J. Patterson reserved to himself 5 per cent of the gross output of said claim, and no transfer for said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam A. Patterson.

(11) That said H. C. Hamilton and other parties working under him extracted large quantities of



gold-bearing gravel and earth from the said Daly Bench and in the spring of the year 1912 cleaned up the dumps of gold-bearing gravel and earth so extracted from said ground, and said defendant Mariam A. Patterson demanded five per cent thereof as owner of the property, claiming the same as royalties due to her by virtue of being the owner of an undivided one-quarter interest in said Daly Bench, and plaintiff in this action, as trustee for the creditors of said H. J. Patterson, a bankrupt, instituted an action in this court, wherein certain orders were made and said five per cent of the gross output of said claim, extracted during the year 1912, amounting to the sum of \$5,174.66, was thereafter deposited in the registry of this court and was there held to await the outcome of this action.

(12) That subsequent to the transfer by said H. J. Patterson to Mariam A. Patterson of an undivided one-quarter interest in said Daly Bench, as hereinabove set forth, and on the 16th day of April, 1912, defendant H. J. Patterson filed a voluntary petition in this court to be adjudged a bankrupt, and was on said date adjudged a bankrupt, and plaintiff in this action was thereafter duly appointed trustee for the creditors of said bankrupt, and thereafter qualified as such, [153] and ever since said time has been, and now is, the duly appointed, qualified, and acting trustee for the creditors of H. J. Patterson, a bankrupt.

(13) That said transfer by said H. J. Patterson to Mariam A. Patterson of said undivided one-quarter interest in and to said Daly Bench was not done

for the purpose of cheating and defrauding the creditors of said H. J. Patterson, but for the purpose of vesting in said Mariam A. Patterson the legal title to said undivided one-quarter interest in said Daly Bench, said Mariam A. Patterson having theretofore and since the 19th day of September, 1910, been the equitable owner thereof.

(14) That said H. J. Patterson was insolvent on the 27th day of November, 1911, and at all times subsequent thereto up until the time of his adjudication as a bankrupt.

(15) That all the moneys now in the registry of this court in this cause, to wit, the sum of \$5,174.66, are the proceeds of five per cent of the gold-dust washed from the gravels extracted from the Daly Bench during the year 1912 and the said 5 per cent of said gold-dust is the same 5 per cent that was reserved to said H. J. Patterson under his agreement with H. C. Hamilton, as hereinabove set forth. [154]

Having found and established the foregoing as its findings of fact, this Court does now make and establish its conclusion of law based thereon, as follows, to wit:

#### CONCLUSIONS OF LAW.

(1) That the deed from H. J. Patterson to Mariam A. Patterson of an undivided one-quarter interest in and to said Daly Bench vested in said Mariam A. Patterson the legal title to said property, subject to all the liens and charges against said property placed or suffered to be placed thereon by the defendant H. J. Patterson, and particularly subject to the terms and conditions of that certain lease from

James Wickersham to H. J. Patterson under date of the 12th day of October, 1911, and no royalties were reserved to the owner of said undivided one-quarter interest in said Daly Bench under the terms and conditions of said lease.

(2) That the five per cent of the gross output of the gold and gold-dust extracted from said Daly Bench, reserved by said H. J. Patterson in his contract with H. C. Hamilton under date of 27 November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

(3) That the deed from H. J. Patterson to Mariam A. Patterson of date of the 27th day of November, 1911, did not transfer to said Mariam A. Patterson any part of the five per cent of the gross output of the Daly Bench, reserved by said H. J. Patterson under his contract with H. C. Hamilton of even date therewith, and said Mariam A. Patterson acquired no right, title, or interest in or to said five per cent of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson.

(4) That said Mariam A. Patterson has no right, title, or interest in or to any part of the gold-dust or the proceeds thereof now in the registry of this court in this cause, the same being the proceeds of five per cent of the gold and gold-dust extracted from said claim and washed from the pay-gravels therein contained in the year 1912.

(5) That all the moneys and gold-dust now in the registry of this court [155] in this cause are the

property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered to plaintiff herein, to be disposed of by him in the manner directed by law in his representative capacity as trustee for said creditors.

(6) That Mariam A. Patterson was at all times subsequent to about the 19th day of September, 1910, the equitable owner of an undivided one-quarter interest in and to the Daly Bench placer mining claim, hereinabove described, and the defendant H. J. Patterson was *per* agent, and said Mariam A. Patterson is bound by all the acts and things done by said H. J. Patterson in connection with said interest.

(7) That said Mariam A. Patterson, under the deed from H. J. Patterson to herself, of date of the 27th day of November, 1911, received the legal title to said undivided one-quarter interest in and to said Daly Bench claim, subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson, and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title or interest in or to any of the royalties, moneys, or gold-dust reserved to said H. J. Patterson under and by virtue of the lease to H. J. Patterson from James Wickersham or the transfer thereof to said H. C. Hamilton, and the agreement with H. C. Hamilton, which said last mentioned agreement was of date of the 27th day of November, 1911.

(8) That Mariam A. Patterson is entitled to a judgment of this Court, adjudging her to be the legal owner of a one-quarter interest in the Daly Bench



placer mining claim hereinabove described.

(9) That plaintiff herein is entitled to a judgment of this Court, decreeing him to be the owner, as trustee in bankruptcy for the creditors of said H. J. Patterson, a bankrupt, and entitled to the possession of, all the gold-dust and proceeds of gold-dust now in the registry of this court in this cause, amounting to the sum of \$5174.66, and for an order directing the clerk of this court to pay and deliver to said plaintiff all the moneys and gold-dust now held by said clerk in said cause as aforesaid.

(10) That plaintiff is entitled to the entry of a judgment against defendants [156] and each of them for all his costs incurred in this action.

Let judgment be entered accordingly.

Dated at Fairbanks, Alaska, this 17th day of May, 1916.

Filed May 17, 1916.

To which findings of fact and conclusions of law requested by plaintiff the defendants made and filed the following objections and proposed the following amendments to wit; [157]

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[Title of Court and Cause.]

**Defendants' Objections and Proposed Amendments  
to Plaintiff's Proposed Findings of Facts and  
Conclusions of Law.**

Defendants hereby submit to the Court the following objections and proposed amendments to the findings of fact and conclusions of law proposed by plaintiff, served and filed May 17, 1916:



1. Substitute for paragraph 2 thereof paragraphs 2, 3, 4, 5, and 6 of defendants' request for findings filed herein.

Defendants object to the word "advancing" in the third line of said paragraph and the words "and advanced to said H. J. Patterson" in the seventh line thereof, and the word "two" in the eighth line thereof, as being contrary to the evidence, and the phrase "in the month of September 1910" as being indefinite, the evidence showing that said work was done on September 20 and 21, 1916.

2. Strike out all of paragraph 3 after the word "thereunder" in the second line, as it is immaterial.

3. Strike out from paragraph 4 the words "prior to the settlement of said controversy last referred to and" in the first and second lines thereof, because they are immaterial.

4. Strike out all of paragraph 7, and substitute therefor the following: That on November 27, 1911, said H. J. Patterson executed and delivered to H. C. Hamilton an instrument of which the following is a copy (here copy instrument in full), and then follow with the last three lines in said paragraph.

5. Defendants object to all of paragraph eight as being contrary to the evidence.

6. Defendants object to all of paragraph 10 as being contrary to the evidence.

7. Strike out all of paragraph 11 and substitute therefor paragraphs 15, 16, and 17 of defendants' requests for findings.

8. Strike out all of paragraph 12 as the matter therein contained is admitted in the pleadings.

9. Strike out the words "cheating and" in the third line of paragraph 13 and substitute therefor the words "hindering, delaying or."

10. Add to plaintiff's request for findings the following paragraphs contained in defendants' requests for findings, to wit, paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. [158]

And defendants submit to the Court the following objections to the conclusions of law proposed by plaintiff:

1. Defendants object to all of paragraph 1 thereof after the word property in the third line, upon the ground that it is not warranted by the evidence and the findings of fact.

2. Defendants object to all of paragraph 2 thereof upon the ground that it is not warranted by the evidence and the findings of fact.

3. Defendants object to all of paragraph 3 thereof upon the ground that it is not warranted by the evidence and the findings of fact.

4. Defendants object to all of paragraph 4 thereof upon the ground that it is not warranted by the evidence and the findings of fact.

5. Defendants object to all of paragraph 5 thereof upon the ground that it is not warranted by the evidence and the findings of fact.

6. Defendants object to that part of paragraph 6 thereof occurring after the word "described" in the third line thereof, on the ground that it is not warranted by the evidence and the findings of fact.

7. Defendants object to that part of paragraph 7 thereof occurring after the word "claim" in the

third line thereof, on the ground that it is not warranted by the evidence and the findings of fact.

8. Defendants object to all of paragraph 9 thereof upon the ground that it is not warranted by the evidence and the findings of fact.

9. Defendants object to all of paragraph 10 thereof upon the ground that it is not warranted by the evidence and the findings of fact.

And defendants propose as amendments to plaintiff's proposed conclusions of law the addition of the following paragraphs contained in defendants' proposed conclusions of law, to wit, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

Filed May 18, 1916.

A. R. HEILIG,  
Atty. for Defendants.

And thereupon, on May 20, 1916, the Court made and filed its Findings of Fact and Conclusions of Law with the clerk of said court, and thereupon defendants excepted to such findings of fact and conclusions of law, and to the overruling of the objections of said defendants made prior to the time that said findings of fact and conclusions of law were signed by the Judge of above-entitled court; and also excepted to the refusal of the Court to make findings of fact and conclusions of law as requested by said defendants as hereinafter more particularly specified, to wit: [159]

[Title of Court and Cause.]

**Defendants' Exceptions to the Findings of Facts  
and Conclusions of Law Herein.**

Comes now the defendants and except to the following paragraphs and parts of paragraphs contained in the findings of fact this day made by the Court, over the objections of defendants heretofore made and filed:

They except to finding of fact number eight.

They except to finding of fact number ten.

And defendants except to the following paragraphs and parts of paragraphs contained in the conclusions of law this day made by the Court over the objections of defendants heretofore made and filed:

They except to that part of conclusion of law number one, which reads, "subject to the terms and conditions of that certain lease from James Wickersham to H. J. Patterson, dated 12 October, 1911."

They except to conclusion of law number two.

They except to conclusion of law number three.

They except to that part of conclusion of law number four, which reads "That said Mariam A. Patterson has no right, title or interest in or to any part of the gold or gold-dust or the proceeds thereof now in the registry of this court in this cause."

They except to conclusion of law number five.

They except to that part of conclusion of law number six, which reads as follows, "and the defendant H. J. Patterson was her agent and said Mariam A. Patterson is bound by all the acts and things done



by the said H. J. Patterson in connection with the said interest.”

They except to that part of conclusion of law number seven, which reads as follows, “subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson, and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title or interest in or to any of the royalties, moneys, or gold-dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton which said last-mentioned agreement was dated 27 November, 1911.”

They except to conclusion of law number nine.

They except to conclusion of law number ten.

Defendants further except to the refusal of the Court to make the following findings of fact requested by defendants and heretofore submitted to the Court and filed in this cause, to wit, they except to the refusal of the Court to make findings numbered 2, 3, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Defendants further except to the refusal of the Court to make the following conclusions of law requested by defendants and heretofore submitted to the Court and filed in this cause, to wit, they except to the refusal of the Court to make conclusions of law numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, and 13.

Dated at Fairbanks, Alaska, on this 20th day of May, 1916.



Foregoing exceptions allowed this 20th day of May, 1916.

A. R. HEILIG,  
Atty. for Defendants.

CHARLES E. BUNNELL,

District Judge.

Filed May 20, 1916. [160]

And now, in pursuance of justice and that right may be done, the defendants present the foregoing as their Bill of Exceptions in this cause and pray that the same may be settled and allowed and certified by the Judge of this court in the manner provided by law.

A. R. HEILIG,  
Attorney for Defendants.

Service of a true copy of the foregoing Bill of Exceptions is hereby acknowledged this 4 day of November, 1916, by receipt of a true copy duly certified to be such.

McGOWAN & CLARK,  
H. E. PRATT,  
Attorneys for Plaintiff. [161]

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[Title of Court and Cause.]

**Order Allowing and Settling Defendants' Bill  
of Exceptions and Approving Defendants'  
Statement of the Evidence.**

Be it remembered that upon the 5th day of December, 1916, the above-named defendants presented the foregoing Bill of Exceptions and statement of evidence to the Court for settlement and approval, which

said proposed Bill of Exceptions and statement of evidence was served and lodged with the clerk of the court and filed within the time allowed by the orders of this Court; and it appearing to the Court from the examination of the proposed Bill of Exceptions and statement of evidence that the same contains all the evidence, testimony and exhibits introduced and given upon the trial of said cause in support of and against the allegations and denials of the complaint, answers and replies herein relative to the claim of plaintiff and defendants respectively to the fund of \$5,174.66 in the registry of the court in this case, said claim being the only matter presented by this appeal, as well as all of the proceedings therein not of record in relation to said matter, and is in all respects true, correct and complete,—

Now, therefore, on motion, it is hereby ordered that the foregoing pages from one to 116, inclusive, be, and the same is hereby, approved, allowed and settled as the Bill of Exceptions and statement of evidence in the above-entitled cause and made a part of the record herein and that the same has been filed and lodged with the clerk of this court and presented within the time allowed by the orders of this court.

Dated at Fairbanks, Alaska, this 5th day of December, 1916.

CHARLES E. BUNNELL,  
District Judge. [162]

Entered in Court Journal No. 13, page 719, at Fairbanks, Alaska.

Service of copy of foregoing order settling Bill of Exceptions and Statement of Evidence acknowledged.

McGOWAN & CLARK,  
H. E. PRATT,  
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 5, 1916. J. E. Clark, Clerk. By L. F. Protzman, Deputy.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 4, 1916. J. E. Clark, Clerk. By L. F. Protzman, Deputy. [163]

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[Title of Court and Cause.]

**Order Enlarging Time for Defendants to Prepare,  
Settle and File a Bill of Exceptions.**

And now, to wit, October 4, 1916, the time in which defendants may prepare, settle and file their Bill of Exceptions in this case is enlarged to twenty days from this date.

CHARLES E. BUNNELL,  
District Judge.

Entered in Court Journal No. 13, page 613.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 4, 1916. J. E. Clark, Clerk. [164]

[Title of Court and Cause.]

**Order Enlarging Time for Defendants to Prepare,  
File and Settle Bill of Exceptions.**

Now, on this day, counsel for the respective parties being present in court and upon oral motion of A. R. Heilig, counsel for the defendants:

IT IS ORDERED that the time in which the defendants have to prepare, file and settle Bill of Exceptions be, and is hereby, enlarged and extended to November 15th, 1916.

CHARLES E. BUNNELL,  
District Judge. [165]

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[Title of Court and Cause.]

**Assignment of Errors.**

Come now the above-named defendants and file the following assignment of errors upon which they will rely upon their appeal from the judgment and decree made by this Honorable Court on the 4th day of October, 1916, in the above-entitled cause:

1.

The Court erred in refusing to make the finding of fact set forth in paragraph 13 of defendants' proposed findings of fact and conclusions of law, as follows:

That on November 27, 1911, but prior to the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson of said quarter interest, the said H. J. Patterson found himself unable to carry on mining operations on the Daly Bench under the

lease from Wickersham, whereupon, with the consent of said Wickersham he assigned said lease to H. C. Hamilton without receiving or being promised any consideration therefor, and without reserving any interest therein to himself; that at the same time and by the same instrument he leased to the said H. C. Hamilton the quarter interest conveyed by Wickersham, the legal title to which was then standing in his name, and reserved for said quarter interest a rent or royalty of 5% of the gross output to be produced by said Hamilton in his mining operations; that at said time no gold had been extracted from said ground and no rent or royalty had accrued.

[166]

## 2.

The Court erred in refusing to make the finding of fact set forth in paragraph 14 of defendants' proposed findings of fact, as follows:

That said lease to Hamilton of said quarter interest was made without the knowledge or consent of Mariam A. Patterson, but prior to the extraction of any gold from said ground she assented to take 5% of the gross output as rent or royalty for her quarter interest in said claim.

## 3.

The Court erred in refusing to make the finding of fact set forth in paragraph 15 of defendants' proposed findings of fact, as follows:

That at the time of the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson, no gold had been extracted from said ground and no rent or royalty had accrued; that the first



cleanup of gold thereon was made in May, 1912, by said Hamilton.

## 4.

The Court erred in refusing to make the finding of fact set forth in paragraph 16 of defendants' proposed findings of fact, as follows:

That at said first cleanup of gold said Mariam A. Patterson was present and demanded from said Hamilton 5% of the gross amount thereof as royalty for her quarter interest, which said Hamilton would have given her then and there had he not been enjoined by order of Court in this action from doing so; instead of giving it to her, pursuant to the same order, he deposited at each cleanup 5% of the amount produced by him and his partners on said claim in court; that the total amount of gold so deposited by him in court, which has been converted into money, is \$5,174.60, which fund is still in the registry of this court. [167]

## 5.

The Court erred in refusing to make the finding of fact set forth in paragraph 17 of defendants' proposed findings of fact, as follows:

That said H. J. Patterson at no time demanded any part of the output of said claim and at no time has he claimed to be entitled to receive any part thereof since he executed and delivered to Mariam A. Patterson a deed to said quarter interest.

## 6.

The Court erred in refusing to make the finding of fact set forth in paragraph 18 of defendants' proposed findings of fact, as follows:

That after H. J. Patterson had assigned the Wickersham lease to Hamilton, the latter, with the knowledge and consent of Wickersham sublet a strip of said claim 250 feet in width to the Smith Brothers; that thereafter, but prior to January 1, 1912, said H. J. Patterson agreed with the Smith Brothers that he would assist them financially in their mining operations, and as compensation therefor they agreed that said H. J. Patterson should receive 5% of the gross output produced by them in mining on said strip; that after assisting them to the extent of \$1,400, said H. J. Patterson found himself unable to perform his part of the agreement and thereupon it was mutually agreed that said contract was annulled, and said H. J. Patterson thereupon relinquished all claim to any part of their output; that thereupon said H. C. Hamilton entered into partnership with said Smith Brothers and financed their mining operations and mined said strip; that after the annulment of said agreement between the Smith Brothers and H. J. Patterson the latter made no further claim to any part of the output of gold produced by any mining operations upon said ground; that at the time said agreement was annulled no gold had been extracted from said ground. [168]

## 7.

The Court erred in refusing to make the finding of fact set forth in paragraph 19 of defendants' proposed findings of fact, as follows:

That neither Mariam A. Patterson nor H. J. Patterson have received any part of the gold mined upon said Daly Bench by Hamilton and his partners or

by any other person, nor has any rent or royalty been paid to them or either of them.

## 8.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 9 of defendants' proposed conclusion of law, which is as follows:

That when H. J. Patterson executed and delivered to Mariam A. Patterson a deed to the quarter interest the latter became entitled to all rents and royalties reserved to said quarter interest in the lease from H. J. Patterson to H. C. Hamilton accruing subsequent to the delivery of said deed.

## 9.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 12 of defendants' proposed conclusions of law, which is as follows:

That Mariam A. Patterson is entitled to receive the fund of \$5,174.66 now in the registry of this court, it being 5% of the gross output of gold produced by H. C. Hamilton and his partners in mining upon said Daly Bench under the lease of said quarter interest made to him by H. J. Patterson prior to the conveyance of the legal title thereto to Mariam A. Patterson and that all of said royalty accrued after the making and delivery of said conveyance. [169]

## 10.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 13 of defendant's proposed conclusions of law, which is as follows:

That defendants are entitled to judgment that plaintiff's action be dismissed.

## 11.

The Court erred in overruling the defendants' objections to the finding of fact number 8 of the findings of fact filed in this cause, and in making the same, which is as follows:

That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from said Wickersham to H. J. Patterson, dated 12 October, 1911, and knew the terms and conditions thereof and had knowledge of and was fully informed of the terms and conditions of the assignment of said lease from said H. J. Patterson to said H. C. Hamilton dated 27 November, 1911, and assented thereto.

## 12.

The Court erred in overruling the defendants' objections to the finding of fact number 10 of the findings of fact filed in this cause, and in making the same, which is as follows:

That the said H. J. Patterson did not at any time assign, transfer or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton wherein said H. J. Patterson reserved to himself five per cent of the gross output of said claim and no transfer of said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam A. Patterson.  
[170]

## 13.

The Court erred in overruling defendants' objections to that part of conclusion of law number 1 of the conclusion of law made and filed in this clause,



and in making the same, which reads as follows:

“Subject to the terms and conditions of that certain lease from James Wickersham to H. J. Patterson dated 12 October, 1911.”

## 14.

The Court erred in overruling defendants' objections to conclusion of law number 2 made and filed in this cause, and in making the same, which is as follows:

That the five per cent of the gross output of the gold and gold-dust extracted from said Daly Bench, reserved by said H. J. Patterson in his contract with H. C. Hamilton dated 27 November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

## 15.

The Court erred in overruling defendants' objections to conclusion of law number 3, made and filed in this cause and in making the same, which is as follows:

That the deed from H. J. Patterson to Mariam A. Patterson, dated 27 November, 1911, did not transfer to said Mariam A. Patterson any part of the five per cent of the gross output of the Daly Bench reserved by said H. J. Patterson under his contract with H. C. Hamilton of even date therewith, and said Mariam A. Patterson acquired no right, title or interest in or to said five per cent of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson. [171]

## 16.

The Court erred in overruling defendants' objec-



tions to that part of conclusion of law number 4 of the conclusion of law signed and filed in this cause, and in making the same, which is as follows:

“That said Mariam A. Patterson has no right, title or interest in or to any part of the gold or gold-dust or the proceeds thereof now in the registry of the court in this cause.”

## 17.

The Court erred in overruling defendants' objections to conclusion of law number 5 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That all the moneys and gold-dust now in the registry of this Court in this cause are the property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered to plaintiff herein to be disposed of by him in the manner directed by law, in his representative capacity as trustee for said creditors.

## 18.

The Court erred in overruling defendants' objections to that part of conclusion of law number 6 of the conclusions of law made and filed in this case, and in making the same, which is as follows:

“And the defendant H. J. Patterson was her agent and said Mariam A. Patterson is bound by all the acts and things done by the said H. J. Patterson in connection with said interest.” [172]

## 19.

The Court erred in overruling the defendants' objections to that part of conclusion of law number 7 of the conclusions of law signed and filed in this

cause, and in making the same, which is as follows:

“Subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title or interest in or to any of the royalties, moneys or gold-dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham *from James Wickersham*, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton, which said last mentioned agreement was dated 27 November, 1911.”

## 20.

The Court erred in overruling the defendants' objections to conclusion of law number 9 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That plaintiff herein is entitled to a judgment of this Court decreeing him to be the owner, as trustee for the creditors of said H. J. Patterson, a bankrupt, and entitled to the possession of all the gold and gold-dust and proceeds of gold-dust now in the registry of this Court in this cause, amounting to the sum of \$5,174.66, and for an order directing the clerk of this court to pay and deliver to said plaintiff all the moneys and gold-dust now held by said clerk in said cause as aforesaid.

## 21.

The Court erred in overruling defendants' objections to conclusion of law number 10 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows: [173]

That plaintiff is entitled to entry of a judgment against defendants and each of them for all his costs incurred in this action.

## 22.

The Court erred in making, rendering and entering the following part of a judgment and decree in favor of the plaintiff and against the defendants, which is as follows:

“That the deed to the said property from H. J. Patterson to Mariam A. Patterson of date the 27th day of November, 1911, was subject to the terms and conditions of a certain lease from James Wickersham to H. J. Patterson, dated the 12th day of October, 1911, and no royalties were reserved by the owner of said interest so conveyed to Mariam A. Patterson under the terms and conditions of said lease, and the five per cent of the gross output of all the gold and gold-dust extracted from said Daly Bench reserved by H. J. Patterson in his contract with H. C. Hamilton dated the 27th day of November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

That Mariam A. Patterson has no right, title or interest either legal or equitable in or to the gold and gold-dust or the proceeds thereof impounded with the clerk of this court in this action, amounting to the sum of \$5,174.66, and that the creditors of H. J. Patterson, a bankrupt, are the owners thereof, and the plaintiff in this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is entitled to the possession thereof, for the purpose of distrib-

uting the same in the manner prescribed by the bankruptcy laws, and that the clerk of this court be, and he is, hereby ordered [174] and directed to pay to the plaintiff herein, as trustee for the creditors of H. J. Patterson, a bankrupt, on the first day of November, 1916, all moneys now in the hands of the clerk of this court impounded in this cause, less such percentage thereof as said clerk is by law entitled to receive for impounding the same, unless said defendant Mariam A. Patterson has, on or before the said date filed with the said clerk of said court a supersedeas bond on appeal in this cause, duly approved by this Court being for such sum as may hereafter be fixed by order of the Court.

That the plaintiff *is* this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is the owner of five per cent of all the gold and gold-dust extracted from said Daly Bench subsequent to the adjudication of said H. J. Patterson, a bankrupt, reserved to said H. J. Patterson under said contract of said H. J. Patterson with H. C. Hamilton, of date of the 27th day of November, 1911, from all persons working said ground under said contract.

That the plaintiff herein be, and he is, hereby given and granted judgment against the defendants, and each of them, for all his costs incurred in this action, to be taxed by the clerk of this court.

## 23.

The Court erred in not making, rendering and entering a decree in favor of the defendant Mariam A. Patterson and against the plaintiff to the effect that defendant Mariam A. Patterson is owner of



and entitled to receive the fund of \$5,174.66 now in the registry of the court, and that the clerk of the court pay said fund to her less his commission for receiving and disbursing the same. [175]

WHEREFORE defendants pray that the judgment and decree of said Court be vacated and set aside in so far as it relates to the fund of \$5,174.66 now in the registry of the court in this cause, and that judgment and decree be entered in favor of the defendant Mariam A. Patterson to the effect that she is the owner of and entitled to receive said fund, and that plaintiff recover nothing by this action and that defendants recover their costs and disbursements; and that they have such other and further relief as in accordance with the law they are entitled to receive.

A. R. HEILIG,

Attorney for Defendants.

Service of the foregoing assignment of errors is hereby acknowledged at Fairbanks, Alaska, this 4th day of December, 1916, by receipt of a true copy thereof.

McGOWAN & CLARK,

H. E. PRATT,

Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 4, 1916. J. E. Clark, Clerk. [176]



[Title of Court and Cause.]

**Petition for Allowance of Appeal and Order  
Granting Same.**

The above-named defendants, Mariam A. Patterson and H. J. Patterson, conceiving themselves aggrieved by that part of the order, judgment and decree made and entered in the above-entitled court and cause on the 4th day of October, 1916, wherein it was adjudged and decreed:

“(2) That the deed to the said property from H. J. Patterson to Mariam A. Patterson of date the 27th day of November, 1911, was subject to the terms and conditions of a certain lease from James Wickersham to H. J. Patterson, dated the 12th day of October, 1911, and no royalties were reserved by the owner of said interest so conveyed to Mariam A. Patterson under the terms and conditions of said lease, and the five per cent of the gross output of all the gold and gold-dust extracted from said Daly Bench reserved by H. J. Patterson in his contract with H. C. Hamilton dated the 27th day of November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

(3) That Mariam A. Patterson has no right, title or interest either legal or equitable, in or to the gold and gold-dust or the proceeds thereof impounded with the clerk of this court, in this action, amounting to the sum of \$5,174.66, [177] and that the creditors of H. J. Patterson, a bankrupt, are the owners thereof, and that plaintiff in this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is

entitled to the possession thereof for the purpose of distributing the same in the manner prescribed by the bankruptcy laws, and that the clerk of this court be, and he is, hereby ordered and directed to pay to the plaintiff herein, as trustee for the creditors of H. J. Patterson, a bankrupt, on the first day of November, 1916, all moneys now in the hands of the clerk of this court impounded in this cause, less such percentage thereof as said clerk is by law entitled to receive for impounding the same, unless said defendant Mariam A. Patterson has on or before the said date filed with the said clerk of said court a supersedeas bond on appeal in this cause duly approved by this court, being for such sum as may hereafter be fixed by order of the Court.

(4) That the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, is the owner of five per cent of all the gold and gold-dust extracted from said Daly Bench subsequent to the adjudication of said H. J. Patterson, a bankrupt, reserved to said H. J. Patterson under said contract of said H. J. Patterson with H. C. Hamilton of date the 27th day of November, 1911, from all persons working said ground under said contract.

All of which is finally ordered, adjudged and decreed at the cost of the defendants.

Do hereby appeal from the above quoted part of said order, judgment and decree made and entered on the 4th day of October, 1916, to the United States Circuit Court of Appeals for the Ninth Circuit, for [178] the reason specified in the assignment of errors filed herein; and they pray that this appeal

may be allowed, and that the transcript of the record, papers and proceedings upon which said part of said judgment and decree was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and they pray that the Court fix the amount of the security which the said defendants shall give and furnish upon such appeal and that upon the giving of such security all further proceedings in this court be suspended and stayed as against the said defendants until the determination of said appeal by said Circuit Court of Appeals.

A. R. HEILIG,  
Attorney for Defendants.

Service of the foregoing petition for allowance of appeal is hereby admitted at Fairbanks, Alaska, this 4th day of December, 1916, by receipt of a copy thereof.

McGOWAN & CLARK,  
H. E. PRATT,  
Attorneys for Plaintiff,

The foregoing petition on appeal is granted.

Done in open court this 4th day of December, 1916.

CHARLES E. BUNNELL,  
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 4, 1916. J. E. Clark, Clerk.  
[179]

[Title of Court and Cause.]

**Order Allowing Appeal and Fixing Amount of Bond.**

Now, on this 4th day of December, 1916, the same being one of the judicial days of the general February, 1916 term, holden at Fairbanks, Alaska, this cause came on to be heard upon defendants' petition for an appeal; and the Court being advised in the premises,—

IT IS ORDERED that the defendants' appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is hereby allowed.

And said defendants having heretofore announced in open court their intention to appeal from that part of the judgment of this court made and entered in this cause on October 4, 1916, awarding to the plaintiff the sum of \$5,174.66 not in the registry of this court in this cause, and the Court having thereupon fixed the amount of the supersedeas and cost bond on appeal in the sum of \$1,000 and the defendants having heretofore and on November 1, 1916, filed in this court and cause a supersedeas and cost bond on appeal in said sum of \$1,000, with sufficient surety, which bond and surety have been approved by this Court, it is further ordered that said bond so approved and filed shall operate both as a supersedeas and cost bond on appeal in this case and have the effect of suspending that part of the judgment of this court so appealed from.



Done in open court this 4th day of December, 1916.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 712.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 4, 1916. J. E. Clark, Clerk.

[180]

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[Title of Court and Cause.]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: We, Mariam A. Patterson and H. J. Patterson, as principals, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Edward Stroecker, as trustee of the estate of H. J. Patterson, a bankrupt, plaintiff herein, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Edward Stroecker, as trustee aforesaid, plaintiff herein, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of October, 1916.

WHEREAS, lately, in the District Court for the Territory of Alaska, Fourth Judicial Division, holden at Fairbanks, Alaska, in a suit pending in said court between Edward Stroecker, as trustee for the creditors of H. J. Patterson, a bankrupt, as plaintiff, and Mariam A. Patterson and H. J. Patterson, as defend-



ants, a judgment was by the above-entitled court given and rendered, to wit, on October 4, 1916, in which it is ordered, adjudged and decreed that Mariam A. Patterson has no right, title or interest either legal or equitable in or to the gold and gold-dust or the proceeds thereof impounded with the clerk of this court in this action, amounting to the sum of \$5,174.66, and that [181] the creditors of H. J. Patterson, a bankrupt, are the owners thereof, and that plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, is entitled to the possession thereof, for the purpose of distributing the same in the manner prescribed by the bankruptcy laws, and that the clerk of this court be, and he is, hereby ordered and directed to pay to the plaintiff herein as trustee for the creditors of H. J. Patterson, a bankrupt, on the first day of November, 1916, all moneys now in the hands of the clerk of this court impounded in this cause, less such percentage thereof as said clerk is by law entitled to receive for impounding the same, unless said defendant Mariam A. Patterson has, on or before said date, filed with the clerk of said court a supersedeas bond on appeal in this cause, duly approved by this Court, being for such sum as may hereafter be fixed by order of the Court, and that said plaintiff recover his costs incurred in this action.

AND WHEREAS said defendants did on the 13th day of October, 1916, announce in open court their intention to appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and requested the Court to fix the amount of an

appeal bond to be given by defendants to act as a supersedeas and cost bond upon such appeal, and the Court having fixed the amount of such bond in the sum of one thousand dollars, for the stay of execution and a supersedeas of the judgment and for costs on appeal.

AND WHEREAS above-named defendants intend to prosecute an appeal to said Circuit Court of Appeals to reverse that part of said judgment above recited;

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants Mariam A. Patterson and H. J. Patterson shall prosecute said appeal to effect, or shall pay and answer all damages and costs if they shall fail to make [182] good their said plea on said appeal, then this obligation shall be void; otherwise to remain in full force, effect and virtue.

H. J. PATTERSON, (Seal)

MARIAM A. PATTERSON, (Seal)

By A. R. HEILIG,  
Her Attorney.

[Seal] UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY.

By WALLACE CATHCART, (Seal)  
Atty. in Fact.

By A. R. HEILIG, (Seal)  
Atty. in Fact.

Above bond approved Nov. 1, 1916.

CHARLES E. BUNNELL,  
District Judge.

O. K. as to form and sufficiency.

McGOWAN & CLARK,  
Attys. for Plaintiff.

[Endorsed]: Filed in the District Court, Territory  
of Alaska, 4th Div. Nov. 1, 1916. J. E. Clark, Clerk.  
[183]

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[Title of Court and Cause.]

**Order Extending Return Day and for Docketing of  
Appeal to and Including February 5, 1917.**

It having been stipulated and agreed by and between the parties hereto through their respective attorneys that the return day and the time for docketing the appeal in this action may be extended to and including the 5th day of February, 1917, on account of the great distance of Fairbanks, Alaska, from San Francisco, California, and the uncertainty of the mail:

Now, therefore, it is hereby ordered that the return day and the time for docketing said cause be and is hereby enlarged to and including the 5th day of February, 1917.

Dated at Fairbanks, Alaska, this 4th day of December, 1916.

CHARLES E. BUNNELL,  
District Judge.

Due service of above order, by receipt of copy, admitted this 4th day of December, 1916.

McGOWAN & CLARK,  
H. E. PRATT,

Attorneys for Plaintiff and Appellee.

Entered in Court Journal No. 13, page 712.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Dec. 4, 1916. J. E. Clark, Clerk. [184]

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**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

United States of America,  
Territory of Alaska,  
Fourth Division,—ss.

I, J. E. Clark, Clerk of the District Court for the Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 186 pages, numbered from 1 to 186, inclusive, constitute a full, true and correct transcript of the record on appeal in cause No. 1769, Edward Stroecker as Trustee of the Estate of H. J. Patterson, a Bankrupt, Plaintiff and Appellee, vs. Mariam A. Patterson and H. J. Patterson, Defendants and Appellants, and was made pursuant to and in accordance with the praecipe of the appellants filed in this action, and made a part of this transcript, and by virtue of the Citation issued in said cause and is the return thereof in accordance therewith, and I certify that the Citation, annexed hereto, is the original thereof; and I do further certify that the index, consisting of pages i to iii, is a correct index of said transcript on appeal; also that the cost of preparing said transcript and this certificate, amounting to ninety and 20/100 dollars (\$90.20), has been paid to me by counsel for appellants in this action.



IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court this 19th day of December, 1916.

[Seal] J. E. CLARK,  
Clerk of District Court, Territory of Alaska, Fourth  
Division. [185]

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[Title of Court and Cause.]

**Citation on Appeal.**

The President of the United States of America, to  
Above-named Plaintiff, Edward Stroecker, as  
Trustee of the Estate of H. J. Patterson, a Bank-  
rupt, Greeting:

You are hereby cited and admonished to appear and be in the United States Circuit Court of Appeals for the Ninth Circuit, in San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal made and entered in the above-entitled cause, in which Edward Stroecker, as trustee of the estate of H. J. Patterson, a bankrupt, is plaintiff and appellee, and Mariam A. Patterson and H. J. Patterson are defendants and appellants, to show cause, if any there be, why that part of the judgment, decree and order made and rendered in said action on October 4, 1916, specified in the petition for appeal and order allowing same, should not be set aside, corrected and reversed and why speedy justice should not be done to the said defendants in that behalf.

WITNESS, the Honorable EDWARD D.  
WHITE, Chief Justice of the Supreme Court of the



United States of America, on this 4th day of December, 1916.

CHARLES E. BUNNELL,  
District Judge for the Territory of Alaska, Fourth  
Judicial Division.

[Seal]

Attest: J. E. CLARK,  
Clerk.

Due service of copy of foregoing citation admitted  
December 4th, 1916.

McGOWAN & CLARK,  
H. E. PRATT,  
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska,  
4th Div. Dec. 4, 1916. J. E. Clark, Clerk. By  
\_\_\_\_\_, Deputy. [186]

[Endorsed]: No. 2923. United States Circuit of  
Appeals for the Ninth Circuit. Mariam A. Patterson,  
and H. J. Patterson, Appellants, vs. Edward  
Stroecker, as Trustee of the Estate of H. J. Patterson,  
a Bankrupt, Appellee. Transcript of the Record.  
Upon Appeal from the United States District  
Court for the Territory of Alaska, Fourth Division.

Filed January 12, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

MARIAM A. PATTERSON and  
H. J. PATTERSON,

*Appellants,*

VS.

EDWARD STROECKER, as Trustee of  
the Estate of H. J. Patterson,  
a Bankrupt,

*Appellee.*

## BRIEF ON BEHALF OF APPELLANTS.

A. R. HEILIG,  
THOMAS R. WHITE,  
*Attorneys for Appellants.*

Filed this.....day of May, 1917.

Filed

FRANK D. MONCKTON, Clerk.

MAY 14 1967

By ..... Deputy Clerk.

F. D. Monckton.



No. 2923

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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MARIAM A. PATTERSON and

H. J. PATTERSON,

*Appellants,*

vs.

EDWARD STROECKER, as Trustee of  
the Estate of H. J. Patterson,

*Appellee.*

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## BRIEF ON BEHALF OF APPELLANTS.

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### Statement of the Case.

This is an equitable action by Edward Stroecker as trustee of the estate of H. J. Patterson, a bankrupt, for the purpose of procuring for the benefit of creditors of the bankrupt, a one-quarter interest in the Daly Bench placer mining claim, situate near Fairbanks, Alaska, together with gold dust of the value of \$5174.66, extracted by lessees from the claim.

The lower court found against the trustee on his claim to the quarter interest in the claim and

for him on his claim to the gold dust. From the judgment below defendants there appeal.

The evidence on the trial showed:

September 19, 1910, James Wickersham owned the Daly Bench placer claim, and on this date agreed with H. J. Patterson to convey to him an undivided quarter interest in this claim if Patterson would at his own expense sink a hole to bed rock and perform the assessment work for 1910 upon it (Tr. 49).

On the same day H. J. Patterson agreed with Mariam Patterson, his wife, that if she would pay with her own money, for sinking said hole and performing said work, she should receive and be the owner of said quarter interest (Tr. 95).

September 20, 1910, at the expense of Mariam Patterson, pursuant to said agreement between her and her husband, a hole 103 feet deep was sunk with a steam drill, but did not reach bed rock. The day following another hole 123 feet deep to bed rock was sunk at the expense of Mrs. Patterson (Tr. 144).

September 21, 1910, Mrs. Patterson paid out of her own funds to the driller, \$225 for sinking the two holes (Tr. 95).

Before the said work was completed Wickersham left the Fairbanks District and did not return until September, 1911, when H. J. Patterson requested of him a deed to Mrs. Patterson for said quarter interest (Tr. 96).



October 14, 1911, Wickersham, without the knowledge or consent of Mrs. Patterson, made the deed to H. J. Patterson as grantee, and delivered this deed to H. J. Patterson on November 10, 1911, consenting at this time that H. J. Patterson convey said quarter interest to Mrs. Patterson (Tr. 97, 98, 100).

November 27, 1911, H. J. Patterson executed and delivered a quitclaim deed for the quarter interest to Mrs. Patterson, the consideration for said deed being the money paid by Mrs. Patterson for making the holes on the claim in 1910 (Tr. 100).

October 12, 1911, Wickersham executed and on November 10, 1911, delivered to H. J. Patterson without the knowledge or consent of Mrs. Patterson, a lease of said claim, reciting the ownership thereof of a quarter interest in H. J. Patterson, reserving 25 per cent of the gross output as royalty. This royalty, on January 29, 1912, before any gold had been produced, was reduced to 20 per cent (Tr. 56, 96, 102).

November 27, 1911, prior to the delivery of the deed from H. J. Patterson to Mrs. Patterson, H. J. Patterson assigned the said lease to one H. C. Hamilton, including in this sublease agreement, the one-quarter interest of Mrs. Patterson, as well as the three-quarter interest of Wickersham, and reserving, by the terms of the instrument, to himself a royalty of 5 per cent, of the gross output of gold, in addition to the royalty required to be

paid Wickersham under the lease. At the time of making this sublease agreement no gold had been extracted from the claim and no rent or royalty had accrued (Tr. 71).

May, 1912, the first cleanup was had, at which Mrs. Patterson was present demanding 5 per cent thereof as hers, because of her quarter interest in the claim and the agreement between H. J. Patterson and Hamilton (Tr. 99).

Hamilton had theretofore been enjoined in this action from paying said 5 per cent, and on this account refused to pay the 5 per cent to Mrs. Patterson and thereafter, under an order of court, deposited 5 per cent of each cleanup with the clerk of the court until \$5174.66 had been thus deposited. H. J. Patterson never demanded or claimed for himself any part of said \$5174.66.

Neither Mrs. Patterson nor H. J. Patterson have received any of the gold taken from said claim (Tr. 99).

From these facts the court found that at all times from and after September 21, 1910, Mariam A. Patterson was the bone fide sole owner of an undivided quarter interest in the Daly Bench claim, but that her husband, H. J. Patterson, was entitled to and owned the royalty of \$5174.66 paid into court by Hamilton under the sublease agreement of November 27, 1911, and that this sum should be delivered to the plaintiff, trustee, for the benefit of the creditors of H. J. Patterson.

### Assignment of Errors.

The appellants rely upon the following errors:

#### 1.

The court erred in refusing to make the finding of fact set forth in paragraph 13 of defendants' proposed findings of fact and conclusions of law, as follows:

That on November 27, 1911, but prior to the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson of said quarter interest, the said H. J. Patterson found himself unable to carry on mining operations on the Daly Bench under the lease from Wickersham, whereupon, with the consent of said Wickersham he assigned said lease to H. C. Hamilton without receiving or being promised any consideration therefor, and without reserving any interest therein to himself; that at the same time and by the same instrument he leased to the said H. C. Hamilton the quarter interest conveyed by Wickersham, the legal title to which was then standing in his name, and reserved for said quarter interest a rent or royalty of 5 per cent of the gross output to be produced by said Hamilton in his mining operations; that at said time no gold had been extracted from said ground and no rent or royalty had accrued.

#### 2.

The court erred in refusing to make the finding of fact set forth in paragraph 14 of defendants' proposed findings of fact, as follows:

That said lease to Hamilton of said quarter interest was made without the knowledge on consent of Mariam A. Patterson, but prior to the extraction of any gold from said ground she assented to take 5 per cent of the gross output as rent or royalty for her quarter interest in said claim.

## 3.

The court erred in refusing to make the finding of fact set forth in paragraph 15 of defendants' proposed findings of fact, as follows:

That at the time of the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson, no gold had been extracted from said ground and no rent or royalty had accrued; that the first cleanup of gold thereon was made in May, 1912, by said Hamilton.

## 4.

The court erred in refusing to make the finding of fact set forth in paragraph 16 of defendants' proposed findings of fact, as follows:

That at said first cleanup of gold said Mariam A. Patterson was present and demanded from said Hamilton 5 per cent of the gross amount thereof as royalty for her quarter interest, which said Hamilton would have given her then and there had he not been enjoined by order of court in this action from doing so; instead of giving it to her, pursuant to the same order, he deposited at each cleanup 5 per cent of the amount produced by him

and his partners on said claim in court; that the total amount of gold so deposited by him in court, which has been converted into money, is \$5174.66, which fund is still in the registry of this court.

## 5.

The court erred in refusing to make the finding of fact set forth in paragraph 17 of defendants' proposed findings of fact, as follows:

That said H. J. Patterson at no time demanded any part of the output of said claim and at no time has he claimed to be entitled to receive any part thereof since he executed and delivered to Mariam A. Patterson a deed to said quarter interest.

## 6.

The court erred in refusing to make the finding of fact set forth in paragraph 18 of defendants' proposed findings of fact, as follows:

That after H. J. Patterson had assigned the Wickersham lease to Hamilton, the latter, with the knowledge and consent of Wickersham sublet a strip of said claim 250 feet in width to the Smith Brothers; that thereafter, but prior to January 1, 1912, said H. J. Patterson agreed with the Smith Brothers that he would assist them financially in their mining operations, and as compensation therefor they agreed that said H. J. Patterson should receive 5 per cent of the gross output produced by them in mining on said strip; that after assisting them to the extent of \$1400, said H. J. Patterson



found himself unable to perform his part of the agreement and thereupon it was mutually agreed that said contract was annulled, and said H. J. Patterson thereupon relinquished all claim to any part of their output; that thereupon said H. C. Hamilton entered into partnership with said Smith Brothers and financed their mining operations and mined said strip; that after the annulment of said agreement between the Smith Brothers and H. J. Patterson the latter made no further claim to any part of the output of gold produced by any mining operations upon said ground; that at the time said agreement was annulled no gold had been extracted from said ground.

## 7

The court erred in refusing to make the finding of fact set forth in paragraph 19 of defendants' proposed findings of fact, as follows:

That neither Mariam A. Patterson nor H. J. Patterson have received any part of the gold mined upon said Daly Bench by Hamilton and his partners or by any other person, nor has any rent or royalty been paid to them or either of them.

## 8.

The court erred in refusing to find as a conclusion of law what is set forth in paragraph 9 of defendants' proposed conclusions of law, which is as follows:

That when H. J. Patterson executed and delivered to Mariam A. Patterson a deed to the quarter

interest the latter became entitled to all rents and royalties reserved to said quarter interest in the lease from H. J. Patterson to H. C. Hamilton accruing subsequent to the delivery of said deed.

## 9.

The court erred in refusing to find as a conclusion of law what is set forth in paragraph 12 of defendants' proposed conclusions of law, which is as follows:

That Mariam A. Patterson is entitled to receive the fund of \$5174.66 now in the registry of this court, it being 5 per cent of the gross output of gold produced by H. C. Hamilton and his partners in mining upon said Daly Bench under the lease of said quarter interest made to him by H. J. Patterson prior to the conveyance of the legal title thereto to Mariam A. Patterson and that all of said royalty accrued after the making and delivery of said conveyance.

## 10.

The court erred in refusing to find as a conclusion of law what is set forth in paragraph 13 of defendants' proposed conclusions of law, which is as follows:

That defendants are entitled to judgment that plaintiff's action be dismissed.

## 11.

The court erred in overruling the defendants' objections to the finding of fact number 8 of the

findings of fact filed in this cause, and in making the same, which is as follows:

That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from said Wickersham to H. J. Patterson, dated 12 October, 1911, and knew the terms and conditions thereof and had knowledge of and was fully informed of the terms and conditions of the assignment of said lease from said H. J. Patterson to said H. C. Hamilton dated 27 November, 1911, and assented thereto.

## 12.

The court erred in overruling the defendants' objections to the finding of fact number 10 of the findings of fact filed in this cause, and in making the same, which is as follows:

That the said H. J. Patterson did not at any time assign, transfer or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton wherein said H. J. Patterson reserved to himself five per cent of the gross output of said claim and no transfer of said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam A. Patterson.

## 13.

The court erred in overruling defendants' objections to that part of conclusion of law number 1 of the conclusions of law made and filed in this

cause, and in making the same, which reads as follows:

“Subject to the terms and conditions of that certain lease from James Wickersham to H. J. Patterson dated 12 October, 1911.”

## 14.

The court erred in overruling defendants' objection to conclusion of law number 2 made and filed in this cause, and in making the same, which is as follows:

That the five per cent of the gross output of the gold and gold dust extracted from said Daly Bench, reserved by said H. J. Patterson in his contract with H. C. Hamilton dated 27 November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

## 15.

The court erred in overruling defendants' objections to conclusion of law number 3, made and filed in this cause and in making the same, which is as follows:

That the deed from H. J. Patterson to Mariam A. Patterson, dated 27 November, 1911, did not transfer to said Mariam A. Patterson any part of the five per cent of the gross output of the Daly Bench reserved by said H. J. Patterson under his contract with H. C. Hamilton of even date therewith, and said Mariam A. Patterson acquired no

right, title or interest in or to said five per cent of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson.

## 16.

The court erred in overruling defendants' objections to that part of conclusion of law number 4 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

"That said Mariam A. Patterson has no right, title or interest in or to any part of the gold or gold dust or the proceeds thereof now in the registry of the court in this cause."

## 17.

The court erred in overruling defendants' objections to conclusion of law number 5 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That all the moneys and gold dust now in the registry of this court in this cause are the property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered to plaintiff herein to be disposed of by him in the manner directed by law, in his representative capacity as trustee for said creditors.

## 18.

The court erred in overruling defendants' objections to that part of conclusion of law number 6



of the conclusions of law made and filed in this cause, and in making the same, which is as follows:

“And the defendant H. J. Patterson was her agent and said Mariam A. Patterson is bound by all the acts and things done by the said H. J. Patterson in connection with said interest.”

## 19.

The court erred in overruling the defendants' objections to that part of conclusion of law number 7 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

“Subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title or interest in or to any of the royalties, moneys or gold dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham *from James Wickersham*, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton, which said last mentioned agreement was dated 27 November, 1911.”

## 20.

The court erred in overruling the defendants' objections to conclusion of law number 9 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That plaintiff herein is entitled to a judgment of this court decreeing him to be the owner, as trustee for the creditors of said H. J. Patterson, a bankrupt, and entitled to the possession of all the gold and gold dust and proceeds of gold dust now in the registry of this court in this cause, amounting to the sum of \$5174.66, and for an order directing the clerk of this court to pay and deliver to said plaintiff all the moneys and gold dust now held by said clerk in said cause as aforesaid.

## 21.

The court erred in overruling defendants' objections to conclusion of law number 10 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That plaintiff is entitled to entry of a judgment against defendants and each of them for all his costs incurred in this action.

## 22.

The court erred in making, rendering and entering the following part of a judgment a decree in favor of the plaintiff and against the defendants, which is as follows:

"That the deed to the said property from H. J. Patterson to Mariam A. Patterson of date the 27th day of November, 1911, was subject to the terms and conditions of a certain lease from James Wickersham to H. J. Patterson, dated the 12th day of October, 1911, and no royalties were reserved

by the owner of said interest so conveyed to Mariam A. Patterson under the terms and conditions of said lease, and the five per cent of the gross output of all the gold and gold dust extracted from said Daly Bench reserved by H. J. Patterson in his contract with H. C. Hamilton dated the 27th day of November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

That Mariam A. Patterson has no right, title or interest either legal or equitable in or to the gold and gold dust or the proceeds thereof impounded with the clerk of this court in this action, amounting to the sum of \$5174.66, and that the creditors of H. J. Patterson, a bankrupt, are the owners thereof, and the plaintiff in this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is entitled to the possession thereof, for the purpose of distributing the same in the manner prescribed by the bankruptcy laws, and that the clerk of this court be, and he is, hereby ordered and directed to pay to the plaintiff herein, as trustee for the creditors of H. J. Patterson, a bankrupt, on the first day of November, 1916, all moneys now in the hands of the clerk of this court impounded in this cause, less such percentage thereof as said clerk is by law entitled to receive for impounding the same, unless said defendant Mariam A. Patterson has, on or before the said date filed with the said clerk of said court a supersedeas bond on appeal in this cause, duly approved by this court

being for such sum as may hereafter be fixed by order of the court.

That the plaintiff *is* this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is the owner of five per cent of all the gold and gold dust extracted from said Daly Bench subsequent to the adjudication of said H. J. Patterson, a bankrupt, reserved to said H. J. Patterson under said contract of said H. J. Patterson with H. C. Hamilton, of date the 27th day of November, 1911, from all persons working said ground under said contract.

That the plaintiff herein be, and he is, hereby given and granted judgment against the defendants, and each of them, for all his costs incurred in this action, to be taxed by the clerk of this court.

### 23.

The court erred in not making, rendering and entering a decree in favor of the defendant Mariam A. Patterson and against the plaintiff to the effect that defendant Mariam A. Patterson is owner of and entitled to receive the fund of \$5174.66 now in the registry of the court, and that the clerk of the court pay said fund to her less his commission for receiving and disbursing the same.

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### Argument.

#### THERE IS NO EVIDENCE TO SUSTAIN THE JUDGMENT.

We are here attempting the usually difficult task of asking a reversal of the judgment of the lower

court on the ground that there is no evidence in the record to support the findings upon which the judgment to the effect that the gold of the value of \$5174.66, belongs to H. J. Patterson and his creditors, rather than to Mariam A. Patterson.

The findings and judgment of the lower court appear to have followed inference and suggestion rather than the testimony.

It seems to have been suggested to the court below that the additional 5 per cent to be paid by Hamilton was the consideration to H. J. Patterson for the assignment to Hamilton of the Wickersham lease on an undivided three-quarters of the claim, and was not royalty to be paid the owner of the fourth quarter interest, but there is absolutely no evidence in the record supporting or tending to support this theory. It is merely theory and wholly without substance.

The assignment agreement itself reads (Tr. 72):

“Now therefore this indenture witnesseth that the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham and in his own right as owner of an undivided one-fourth part of the title to said mining claim, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915, upon the same terms, conditions and covenants and subject to the same terms and conditions as in said lease from James Wickersham to said H. J.



Patterson set forth, excepting, however, that the said H. C. Hamilton, shall pay as royalty and rental as such lessee twenty-five per cent of the gross amount of each and every cleanup of gold and dust made by him upon said demised premises to the said James Wickersham, and shall pay in addition thereto five per cent of the gross amount of each and every cleanup of gold and gold dust made by him upon said premises to the said H. J. Patterson.  
\* \* \*

H. J. Patterson testified (Tr. 97-98):

“After Wickersham got back to Fairbanks in the fall of 1911 I went to see him for the purpose of getting the deed to the quarter interest and to get a new lease. I asked him to make the deed to Mrs. Patterson, because, as I told him, she had paid for sinking the drill holes. He didn't do that and stated as his reason, ‘I don't want to mix things up. I want to do business with you. I will give you the deed and you can make the deed to whoever you like’. I did not do any mining myself on the Daly Bench in 1911, under the Wickersham lease; there was a controversy over the title to most of that claim, which was compromised, and I had all I could possibly handle at that time on Engineer creek. So I transferred or assigned the lease to Henry C. Hamilton. I received nothing for the assignment of that lease except a promise. Hamilton subleased to the Smith Brothers the upper 250 feet and afterwards went in as a partner with them in working it. He also worked the next, the middle 300 feet. At no time did I receive anything from Hamilton as the proceeds of mining operations carried on by himself or with the Smith Brothers, and I never demanded any part of the proceeds of the royalty when Mr. Hamilton was called upon to pay. Under

the assignment of the lease which I made to Hamilton there was a provision that he should pay as royalty to Wickersham twenty-five per cent of the gross output, but there never was any understanding or agreement with him that I was to receive any part of that royalty."

\* \* \*

and again (Tr. 99):

"I never received any of the five per cent royalty which was reserved to me under this lease to Hamilton. My understanding was that that five per cent was to go to the quarter interest that Wickersham gave to me. The first cleanup of gold made on that ground was in May, 1912, after the water began running. Prior to that time no royalty had accrued under the lease. At the first cleanup Henry T. Ray was present, representing Wickersham; Mr. Hamilton, and Mrs. Patterson and I were also present. Mrs. Patterson then demanded her share of the cleanup, her royalty, five per cent upon the ground that she was the owner of the quarter interest. She did not receive it. Mr. Hamilton said that Mr. Clark had told him there were proceedings started for an injunction and that he didn't feel like that he could give it; and the Smith Brothers they were going to give it to her anyway; and I was afraid of complications and I didn't want to get the others in wrong, and I asked Mr. Hamilton to telephone Mr. Heilig and find out; and he telephoned to Mr. Heilig and told me that Mr. Heilig said there was an injunction against her receiving any money or any royalty."

\* \* \*

and further (Tr. 100):

"At that cleanup I did not demand any part of the royalty nor at any other cleanup. I did not consider myself entitled to any part of the royalty at any of the cleanups. After I received

the deed for the quarter interest from Wickersham I told my wife that he had made the deed to me and that I was very much disappointed the way the thing had to be done and everything, and tried to explain it to her the best I could. I told her I would make a deed to her the next time I went to town. The deed from Wickersham to me was not delivered to me by him until after the settlement of the controversy regarding the title to the ground; and on the 10th of November, 1911, after it was settled, Wickersham and I went to the recorder's office and recorded the agreement settling the controversy regarding the title, and the lease to me and the deed to me. I paid for the recording. Prior to that time I didn't have the deed. On the 27th day of November, 1911, I executed a conveyance of this quarter interest to my wife." \* \* \*

and (Tr. 102):

"Mrs. Patterson did not see any of the documents which were drawn up and signed by me and Wickersham with reference to the Daly Bench before they were executed. She did not see the lease that I made to Hamilton of the quarter interest before it was executed. I told her what I had done and she seemed to be very well satisfied with it. On two occasions I asked Wickersham to make this deed in Mrs. Patterson's name, the second occasion was when he came to make out the deed. I asked him to make the deed to her for she had paid for the sinking of the two holes. I received nothing from Mrs. Patterson at the time I made this deed to her, nor did at any time receive anything from her for this quarter interest. I never sold this quarter interest to her; I considered it merely a transfer; the consideration for the transfer to her of the legal title which stood in my name was because she had paid for the sinking of the drill holes. The

paying of the expense of sinking the drill holes was what my agreement with Wickersham called for as the purchase price of the quarter interest, and it was upon that consideration that I agreed with my wife that if Wickersham made the deed in my name that I would transfer it directly to her."

H. J. Patterson was cross-examined at length as to this 5 per cent (Tr. pp. 118 et seq.) and examined again on redirect (Tr. pp. 140-142) but always testified to the same effect: that the five per cent additional royalty provided for in the sublease agreement was to be paid in consideration for the lease on Mrs. Patterson's quarter interest in the claim.

Mrs. Patterson testified (Tr. 152):

"Q. This lease which Mr. Patterson made to Mr. Hamilton—did you see that at the time it was executed?

A. No, sir.

Q. Were you informed of what provision was made in that lease for the royalty that was to accrue to this quarter interest that you owned?

A. Only that Mr. Patterson told me that he had reserved five per cent for the quarter interest.

Q. Did you assent to that?

A. Yes. Afterwards I made a demand upon Mr. Hamilton while he was operating under that lease for my royalty. I was present at the first cleanup and after he had weighed out Judge Wickersham's royalty and I saw that he was preparing to pour all the rest into a poke, I said: 'Mr. Hamilton, where is my share?' and then he told me that an injunction had been served and he had been instructed



not to pay it to me but to pay it into court until the question of the ownership was decided. Mrs. Hamilton was present at the time. I am not sure but I think I was at all of the cleanups and helped clean some of the dust; Mr. Patterson was in attendance at the same time. Mr. Patterson made no demand at any of those cleanups for royalty from Mr. Hamilton or from the Smith Brothers for himself that I know of." \* \* \*

The language of the sublease agreement, plaintiff's exhibit "E" (Tr. 71) and the testimony of Mr. and Mrs. Patterson constitute all of the evidence in the record upon the question of the ownership of the \$5174.66 in controversy.

Upon this evidence the lower court based its 8th finding (Tr. 39):

"(8) That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from said Wickersham to H. J. Patterson, dated 12 October, 1911, and knew the terms and conditions thereof, and had knowledge of the assignment of said lease from said H. J. *Hamilton* to said H. C. Hamilton, dated 27 November, 1911, and assented thereto."

and also its 10th finding (Tr. 40):

"(10) That the said H. J. Patterson did not at any time assign, transfer or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton, wherein said H. J. Patterson reserved to himself five per cent of the gross output of said claim, and no transfer of said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam Patterson."



and stated in its fourth conclusion (Tr. 43) that Mrs. Patterson had no right, title or interest in the \$5174.66 and rendered judgment (Tr. 47) to that effect, although the court also said in its thirteenth finding (Tr. 41):

“(13) That the deed from H. J. Patterson to Mariam A. Patterson of said undivided one-quarter interest in and to said Daly Bench was made by him and received by her in good faith, for a valuable and sufficient consideration, and without any design on the part of either of them to hinder, delay, or defraud any creditor of the said H. J. Patterson, but for the purpose of vesting in said Mariam A. Patterson the legal title to said undivided one-quarter interest in and to said Daly Bench, said Mariam A. Patterson having theretofore and since the 19th day of September, 1910, been the equitable owner thereof”,

and rendered judgment (Tr. 46) to the same effect.

The court thus found and adjudged that although Mrs. Patterson had been the owner of the quarter interest since September 21, 1910, she had no right to any of the royalty to be paid under a lease made on November 27, 1911, which covered her quarter interest; that because her agent had caused the lease to read that the royalty should be paid to him she had no interest in it and when the agent became a bankrupt the royalty belonged to his creditors.

Where the court below found anything in the record upon which to base a judgment to the effect that Mrs. Patterson was not entitled to the royalty paid on account of her quarter interest, we have been utterly unable to discover. It seems to us that

to put any right to this royalty in Patterson there would be required an assignment from Mrs. Patterson to him, not an assignment from him to her as suggested by the lower court in its tenth finding (Tr. 40). Why should she be required to exhibit an assignment from her agent for what was admittedly her own?

The ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is no more than the shadow following the equitable estate which is the substance.

Pomeroy's Equity, Sec. 147.

In any event Mrs. Patterson was the holder of both legal and equitable title to the quarter interest before any royalties were due for she recorded her deed November 27, 1911. No pay dirt was found until after January 29, 1912 (Tr. 99).

Her ownership entitled her to the rents and royalties subsequently accruing.

Devlin on Real Estate, Secs. 311, 862a, 862c;

Burt v. Ellett, 19 Wall. 544;

Higgins v. California Petroleum and Asphalt Co., 109 Cal. 304;

McConnell v. Pierce, 210 Ill. 627; 71 N. E. 622.

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#### ESTOPPEL.

The court held that Mrs. Patterson was the real bona fide owner for value of an undivided quarter of the "Daly Bench".

The question of her estoppel to claim this ownership as against her husband's creditors is not before this court. This question was settled favorably to Mrs. Patterson by the lower court and from that portion of the judgment no appeal has been taken.

As to the \$5174.66, there is nowhere in pleadings or proof, anything to show that the trustee in bankruptcy ever had the slightest idea that Mrs. Patterson was estopped to claim that the additional 5 per cent provided to be paid by Hamilton belonged to her.

No creditor witness testified that he ever knew or heard of this 5 per cent to be paid by Hamilton. No creditor witness testified he knew such an agreement existed as that under which Hamilton operated the claim.

The theory of the trustee on the trial as evidenced by his pleadings and proof was that the quarter interest in the claim had been transferred to Mrs. Patterson for the purpose of defrauding her husband's creditors.

When the court found against this claim of fraud the trustee seems to have changed his theory to one under which he claimed that though the quarter interest did not belong to Mr. Patterson and could not be subjected to the payment of creditors' claims, the trustee could take possession of the 5 per cent of the gold dust to be paid by Hamilton under his sublease, the trustee taking the position that this 5 per cent was the consideration paid

by Hamilton for the sublease of the Wickersham three-quarters of the claim and that Hamilton was to pay nothing for the lease of Mrs. Patterson's quarter interest.

Blake v. Meadows, 225 Mo. 1; 123 S. W. 868; 30 L. R. A. (N. S.) 1 (and note), was an action by a trustee in bankruptcy to set aside a deed from a bankrupt to his wife. The Supreme Court of Missouri reversed the judgment of the lower court in favor of plaintiff and dismissed the bill and held:

“The conveyance by a bankrupt to his wife of real estate which he had purchased with her funds but held in his own name cannot be interfered with by the bankruptcy trustee, in the absence of anything to estop her from claiming the benefit of the trust.”

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#### THIS IS NOT A “FRAUD” ACTION.

This action, as we are now viewing it, is not a fraud action. The only fraud alleged in the complaint is with reference to the transfer of the quarter interest in the claim by Patterson to his wife; and that she (Tr. 7) by virtue of this fraudulent conveyance claims 5 per cent of the gross output of the claim.

Fraud must be alleged not only specially but specifically.

12 Ruling Case Law, 416;

Magee v. Manhattan Life Ins. Co., 92 U. S. 93.

The court having found and adjudged that this conveyance to Mrs. Patterson was not fraudulent, it follows that her claim to royalty thereunder is not fraudulent. The matter resolves itself into a simple question of title as between H. J. Patterson and Mariam A. Patterson, with no presumptions against the title or rights of Mariam A. Patterson.

We submit that in this view of the situation there is not a "scintilla" of evidence to show any right of title to this 5 per cent in H. J. Patterson. The only testimony on the subject is that the 5 per cent was royalty for mining the quarter interest belonging to Mrs. Patterson.

The result of the judgment below is that Mrs. Patterson's agent and trustee who was in charge of and handling her property receives a royalty of 5 per cent from the entire gold content of the claim one-fourth of which comes out of the quarter interest of Mrs. Patterson, yet Mrs. Patterson gets nothing and the claim is worked out (Tr. 147).

The case is to be viewed as though all reference in the complaint to the ownership of the quarter interest were eliminated and there only appeared therein the allegations (Tr. 6) to the effect that Patterson was by the sublease agreement with Hamilton "entitled to receive" from Hamilton 5 per cent of the gross output of gold from the claim.

The whole question here is whether the 5 per cent belonged to the quarter interest owned by Mrs. Patterson, or to the lease of the three-quarter



interest from Wickersham to Patterson; whether Hamilton was giving the 5 per cent because Patterson assigned to Hamilton the Wickersham lease, or was giving the 5 per cent for the lease on Mrs. Patterson's quarter interest.

If Hamilton agreed to pay Patterson the 5 per cent for Patterson's interest in the Wickersham lease on a three-quarters interest only, then Patterson owns the 5 per cent. If the 5 per cent was partly for the sublease and partly for the lease on the quarter interest the whole 5 per cent would belong to Mrs. Patterson as against her agent and trustee.

If either intentionally or through negligence an agent allows the property of his principal to become so commingled with his own that they cannot be separated the whole must be surrendered by him to the principal.

Clark and Skyles Law of Agency, Sec. 421;

Yates v. Arden, 5 Cranch C. C. 526; Federal  
Case No. 18126;

Marine Bank v. Fulton, 2 Wall. 252.

“Every doubt will be resolved in the principal's favor; and if the two sums cannot be distinguished the agent must satisfy to the full every legal or equitable claim of the principal even to the extent, if that should be necessary, of giving the whole fund or mass to the principal.”

Corpus Juris, Vol. 2, p. 742.

This burden is also on the agent's creditors and representatives.

Hooley v. Gieve, 9 Abb. N. Cases (N. Y.) 8.

Patterson held the legal title to the quarter interest in trust for his wife.

Why should a meaning be put on the sublease agreement with Hamilton that would deprive the trustor of her entire interest in the subject matter of the trust and vest it in the trustee?

The losses to the creditors of Patterson, the trustee, seem to have hidden from the court the rights of the trustor as against her trustee.

That portion of the judgment of the lower court to the effect that Mariam A. Patterson is not the owner of the gold dust valued at \$5174.66 should be reversed.

Dated, San Francisco,  
May 12, 1917.

Respectfully submitted,

A. R. HEILIG,

THOMAS R. WHITE,

*Attorneys for Appellants.*



No. 2923

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and  
H. J. PATTERSON,

*Appellants,*

VS.

EDWARD STROECKER, as Trustee of  
the Estate of H. J. Patterson,  
a Bankrupt,

*Appellee.*

## BRIEF FOR APPELLEE.

McGOWAN & CLARK,  
THOMAS A. McGOWAN,  
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H. E. PRATT,

*Attorneys for Appellee.*

CHARLES J. HEGGERTY,  
KNIGHT & HEGGERTY,  
*Of Counsel.*

**Filed**

JUN 23 1917

**F. D. Monckton,**  
Clerk.

*Filed this.....day of June, 1917.*

FRANK D. MONCKTON, Clerk.

*By.....Deputy Clerk.*





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## BRIEF FOR APPELLEE.

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### Argument.

The *question* for decision upon the record in this case is, whether or not the *deed* conveying his one-fourth interest, made by Patterson to his wife on November 27, 1911, carried with it an assignment or conveyance of the *sub-lease* made by Patterson to Hamilton prior to the execution of the deed by Patterson to his wife, under which *sub-lease* Patterson retained 5 per cent. of the *gross* output of the *whole* claim.

Our contention is that the trial Court correctly held said 5 per cent. was not conveyed by the deed, but remained the property of Patterson, constituting *assets* of Patterson which passed to his insolvent estate upon his voluntary bankruptcy; and that the appellee, as his trustee in bankruptcy, was entitled to recover that 5 per cent. for distribution among Patterson's creditors.

The subject matter of the deed by Patterson to his wife is thus described in that deed, viz:

“All his right, title and interest, *being* an undivided *one-fourth* interest in and to that certain bench placer mining claim situate in the Fairbanks Precinct, Alaska \* \* \* ” (Tr. 74-75).

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**FORMER DECISION OF THIS CIRCUIT COURT OF APPEALS (STROECKER v. PATTERSON ET AL., 220 FEDERAL 21) IS THE LAW OF THIS CASE; AND HOLDS THAT THE DEED BY PATTERSON TO HIS WIFE DID NOT CONVEY THE 5 PER CENT ALONE INVOLVED ON THIS APPEAL.**

Upon a *former trial*, at the conclusion of the evidence of plaintiff, the Court below made a decree *dismissing* the action; upon appeal to this Court that decree was *reversed* in an opinion written by Circuit Judge Ross, concurred in by Circuit Judge Gilbert and District Judge Wolverton, and is reported as *Stroecker v. Patterson et al.*, 220 Fed. 21 (No. 2411, in this Court).

The decision of this Court on that appeal, we assert, is decisive of and the *law of that case* upon the present appeal.

The *facts* of the case developed upon that trial are identical with the facts proved upon the present trial so far as concerns the question now before the Court for decision and the sufficiency of the evidence to support the Court's holding that the deed by Patterson to his wife neither conveyed nor in anywise affected the right of Patterson to retain the 5 per cent of the gross output under Patterson's lease and agreement with Wickersham and his sub-lease to Hamilton.

These facts Judge Ross clearly collated and stated in his opinion upon the former appeal, as follows:

“Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

Ross, Circuit Judge. This suit was brought by the trustee of the estate of a bankrupt to set aside a conveyance made by him to his wife of an undivided one-fourth interest in a certain placer mining claim called Pat Daly Bench, situate on Ester creek, Alaska, on the ground of alleged fraud in the making of such conveyance, and also to restrain the defendants, husband and wife, from demanding and receiving from the lessee of the entire claim 5 per cent. of the gross output of the gold thereof—the complaint alleging, among other things, in substance, that on the 27th day of November, 1911, the defendant H. J. Patterson, being then insolvent and unable to pay his then creditors, for the purpose of hindering, delaying and defrauding them, executed to his wife, the defendant, Mariam A. Patterson, a deed conveying all of his interest, to wit, an undivided one-fourth, of the mining claim mentioned, which his said wife took and since holds in trust for her husband, to aid him in cheating his creditors;

that prior to that alleged fraudulent conveyance the husband held a lease of the whole of the said mining claim, which lease he, prior to his adjudication in bankruptcy, assigned for a valuable consideration to one H. C. Hamilton, who is still the owner and holder thereof, and under which he is mining the said claim upon the terms and conditions of the original lease thereof to H. J. Patterson, and of the sublease of the latter to him; that under such terms and conditions the defendant H. J. Patterson was entitled to receive from Hamilton's operations of the property 5 per cent. of the gross output of the ground; that the interest of the said H. J. Patterson under the lease has never been assigned to any one; that his wife, the said Mariam A. Patterson, claims to be the assignee of all benefits under the lease, and to be entitled to receive the said 5 per cent. of the gross mineral output of the claim, by virtue of the alleged fraudulent conveyance made to her by her husband of his undivided one-fourth interest in the claim; that on or about May 8, 1912, Hamilton made his first clean-up of the dump extracted by him from the claim during the spring of 1912, and that at the time of such clean-up the defendants Patterson demanded of him the payment of 5 per cent. of the gross output thereof, which demand was refused by the said Hamilton, who still has the said 5 per cent. of the output in his possession, and that the said Hamilton will, from time to time as the said winter dump is cleaned up, have other sums of money realized therefrom, 5 per cent. of which the defendants Patterson will claim and receive from the said Hamilton, unless restrained therefrom by the court; that the said Mariam A. Patterson is insolvent, and that if she secures possession of the said 5 per cent. of the gross output of the claim the same will be lost to the creditors of her husband

and to the trustee, plaintiff in the suit; that the said Mariam A. Patterson has no right to or interest in any of the said gold, and that the plaintiff, as such trustee, is entitled to receive the said 5 per cent. of the gross output of the claim, to be applied towards the payment of the creditors of the said bankrupt. The prayer of the complaint is for the appointment of a receiver to take and receive the said 5 per cent. of the gross output of the claim until the title thereto can be determined, or that the same be ordered paid into the registry of the court; for a temporary order restraining the defendants Patterson, their agents, etc., from demanding or receiving any portion of the said 5 per cent. of the said gross mineral output; and for a decree adjudging the deed from the husband to his wife fraudulent and void, and that the defendant Mariam A. Patterson convey the said undivided one-fourth interest in the said claim to the plaintiff, as trustee of the creditors of the defendant bankrupt.

The husband and wife answered separately. The answer of the wife, among other things, denied that the deed from the husband to her was made for any fraudulent purpose, and in effect set up that on the 19th day of September, 1910, James Wickersham was the sole owner of the said mining claim, and on that day entered into an agreement with the said H. J. Patterson, whereby he agreed to convey to the said Patterson an undivided one-fourth interest in the claim, if Patterson would sink a hole upon the claim to bed rock, and do the assessment work thereon for the year 1910, to which conditions the latter consented, "but desired to use what money he had for other purposes, and therefore, with the knowledge and consent of the said Wickersham, agreed with this defendant (the wife) that, if she would pay with her own funds the expense of sinking such



hole to bed rock and of doing said assessment work, she should be entitled to receive and would receive a conveyance of said quarter interest, instead of said H. J. Patterson"; that in pursuance of the agreement last mentioned the defendant Mariam A. Patterson did, at her own expense, cause to be sunk, on the 20th and 21st days of September, 1910, a hole to bed rock, and did cause to be done upon the said claim the assessment work for the year 1910, for all of which work she paid to the persons doing the same the sum of \$225, all of which was her separate property, in which her husband had no interest; that before Wickersham had time to execute a deed conveying a quarter interest in the claim, as he had agreed to do, he left Alaska, and did not return until late in the fall of 1911, at which time her husband requested him to convey the said quarter interest to her, "upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant (the wife), and delivered the same to said H. J. Patterson on or about the 10th day of November, 1911, but with the express understanding, had between the said Wickersham and the said H. J. Patterson, that the latter would convey the bare legal title to said quarter interest so received by him to this defendant (the wife); that thereafter, when this defendant learned that said deed had been made and delivered to said H. J. Patterson, she demanded from him a conveyance of the legal title to her in pursuance of his said agreement with her, whereupon said H. J. Patterson did, on the evening of November 27, 1911, by deed convey to this defendant the legal title to said quarter interest then held by him", which interest she has ever since owned, and now own, and in which her husband

never had any interest, except the bare legal title. The answer of the husband was substantially to the same effect. Both answers denied that the conveyance in question was made for any fraudulent purpose.

The record shows that on the coming on of the cause for trial the plaintiff introduced in evidence the contract between Wickersham and H. J. Patterson, the lease made by the former to the latter of the entire claim, the sublease of the claim by Patterson to Hamilton, the conveyance from H. J. Patterson to his wife, Mariam A. Patterson, and the oral testimony of H. J. Patterson and of two other witnesses, John Junkin and E. R. Peoples. Upon the conclusion of that evidence the court below granted the defendants' motion to dismiss the suit, and in its judgment dismissing it appears the following respecting the 5 per cent. of the gross amount of gold taken from the claim by the lessee, Hamilton:

'And it further appearing from the records of this action that, on the 17th day of May, 1912, an order was made in this cause, directing H. C. Hamilton, as lessee of the Daly Bench, described in the complaint herein, [to] deposit with the clerk of this court 5 per cent. of the gross amount of gold mined by him upon said mining claim during the pendency of this action, as royalty accruing to the owner of the undivided one-fourth interest in said Daly Bench, the title to which is in controversy in this action, to be held to await the determination thereof, and that the value of the said 5 per cent. of the gross amount of gold so mined by the said Hamilton is \$5,174.66. It is further ordered that, in the event that, within ten days from the date of this judgment the plaintiff has not filed with the clerk of this court a supersedeas bond, approved by the court, for an appeal from this judgment, the

clerk of this court pay to the said Mariam A. Patterson, or her attorney, A. R. Heilig, the said sum of \$5,174.66, if said gold dust or money has been deposited with him, and that, if the said Hamilton has deposited said gold dust with the American Bank of Alaska, then said bank pay said sum to the said Mariam A. Patterson, or her said attorney.'

The contract of September 19, 1910, between Wickersham and H. J. Patterson, after reciting the ownership and possession by Wickersham of the claim, and the desire of Patterson to prospect it and to take a lease thereof for its future working, provides, among other things that:

'In consideration of the sinking of a hole from the surface to bed rock thereon, for the purpose of prospecting the said ground and determining its value, by the party of the second part [Patterson] at his own expense, the party of the first part [Wickersham] does hereby agree to make, sign and deliver to the party of the second part a quitclaim deed to an undivided one-fourth interest in the said premises. The party of the second part undertakes hereby, in consideration of said agreement and transfer, to sink said hole upon the said premises, and to do the assessment work for the year 1910 without any expense whatever to the party of the first part. In further consideration of the rents, royalties, covenants, and agreements hereinafter reserved, and by the said party of the second part to be kept, paid, and performed, the party of the first part does hereby grant, demise, let, and lease unto the said party of the second part the whole of the said premises together with all the appurtenances. \* \* \*

And in consideration of the said demise the said party of the second part does covenant and agree to and with the said party of the first part as follows, to wit: To enter upon

said demised premises within a reasonable time after the signing and sealing of these presents, and to dig, excavate, bore, or otherwise sink one hole from the surface to bed rock upon said claim, for the purpose of prospecting the said ground and doing the assessment work for the year 1910.'

Under and pursuant to that lease Patterson, according to the evidence, caused two holes to be sunk on the claim, the first to bed rock at a depth of 100 feet, and the second to a depth of 125 feet. He then left the Daly Bench claim and went elsewhere to work. Thereafter, and in the year 1911, the holders of a mining claim called Happy Home Association claim, which adjoined the Daly Bench claim, took possession of the latter, claiming it to be a part of their claim; and such was the condition of affairs on the return of Wickersham to Alaska; the dispute being compromised in and by a written agreement executed November 8, 1911, by the holders of the Happy Home location on the one part, and by Wickersham and H. J. Patterson on the other, which compromise awarded to the Happy Home claimants a strip only of the Daly Bench claim.

Shortly before the execution of that compromise agreement, to wit, October 12, 1911, Wickersham had executed to H. J. Patterson a second lease of the Daly Bench claim for a term extending to October 12, 1915, reciting, among other things, the ownership by Wickersham of the undivided three-fourths thereof and the ownership by H. J. Patterson of the remaining one-fourth, and reciting that Patterson had applied to Wickersham for a lease covering the entire claim upon certain terms and conditions, which Wickersham thereby granted; the instrument further reciting, among other things, that:

'As part consideration of this lease the party of the second part [H. J. Patterson] agrees



that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease, and shall also at all times be subject to any debts, defaults, or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease; and it is especially agreed that the party of the first part [Wickersham] shall have a first lien upon the whole of the output of the whole of the Daly claim, *including the undivided one-fourth interest of the party of the second part*, for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease.'

The last-mentioned instrument further imposed upon the lessee the obligation to begin work upon the leased property within 30 days from its execution, and thereafter to continuously maintain possession of the property and mine the same in a good and minerlike manner, and, among various other terms and conditions, the following:

'And the party of the second part [H. J. Patterson] does hereby *specially agree not to assign this lease or lay, or any interest therein or thereunder*, and not to sublet or sublease the said demised premises, or any part thereof, *nor to permit the same*, nor any part thereof, *nor any interest therein, to pass to any other person whatever, without the written consent of the party of the first part [Wickersham]* had and obtained, and *this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part.*'

The deed from Wickersham to H. J. Patterson of the one-quarter interest in the claim was



made October 14, 1911, and contained this recitation:

‘Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States statute.’

That deed was recorded at the request of Patterson. The deed from the latter to his wife was made November 27, 1911, expressing a consideration of \$1 and quitclaiming to her ‘all his right, title, and interest, being an undivided one-fourth interest’, in the Daly Bench claim. *That deed did not purport to convey to the defendant Mariam A. Patterson any part of her husbands’ interest in the amount then due or afterwards to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of the 5 per cent. of the gross mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham. It is therefore impossible to sustain the judgment of the court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim under the lease assigned to him.”*

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#### COURT’S CONCLUSION ON THESE FACTS.

The *conclusion* of this Court upon these facts, *reversing* the decree dismissing appellee’s action, is thus stated by Judge Ross (*italics ours*), viz.:

“*That deed did not purport to convey to the defendant Mariam A. Patterson any part of her husband’s interest in the amount due or afterwards to become due to him from Hamilton under the lease by which the latter worked the*

ground, and *certainly did not convey to her* any part of the 5 per cent. of the *gross mineral output* which was derived from the undivided three-fourths of the claim owned by Wickersham. It is *impossible to sustain the judgment* of the Court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim *under the lease assigned to him*" (Stroecker v. Patterson, 220 Fed. 21, 25-26).

Every material and substantial fact and word of evidence, in relation to this point, viz: that the deed from Patterson to his wife did not transfer any interest in or under the lease (as of course, under the Wickersham lease and agreement with Patterson, the deed could not—Transcript, 49 to 55 and 56 to 64, especially page 62), was in evidence and before the trial Court and this Court on the *former* appeal; and that decision is necessarily the *law of the case* upon the *same* facts and evidence *now* before this Court on the present appeal.

1. The *pleadings* on both appeals are exactly the *same*;

2. The *two leases* and agreements between Wickersham and Patterson, one of September 19, 1910, and the other of October 12, 1911, are the *same*;

3. The agreement settling the *dispute* as to part of Daly claim on settlement of Wagner et al., claiming part of mine with Wickersham and Patterson, the *same*;

4. Deed of Wickersham to Patterson, *same*;

5. Assignment of lease by Patterson to Hamilton, same;

6. Deed of Patterson to his wife, the appellant, same;

7. Patterson's testimony.

Here, on *both* appeals, are found the identical, same *documentary* evidence, and the same and only important witness, Patterson, by whom the *assignment of lease* to Hamilton reserving this 5 per cent. to himself was made, and who afterwards made the deed to his wife.

The *issues* raised by the pleadings upon the *first* trial of the case below were *all the same* on the retrial; the *documentary* evidence, leases, assignment, agreements, deeds, etc., were *all the same* on the second trial, with the *addition only* of two bank books, bank check and note *relating only* to the proof that the money paid to *drill* the holes to bedrock was paid by *Mrs.* Patterson and was her *separate* property; the *testimony* of Patterson on the retrial the *same*, with the addition of *Mrs.* Patterson's testimony on the retrial cumulative of her husband's; and the *result* of the *new* trial being a judgment that *Mrs.* Patterson owned under the deed to her subject to all the leases, agreements and assignment to Hamilton, *only* the *undivided quarter interest*, conveyed to her by the deed of Patterson, but *not* any part of the *five per cent.* reserved to Patterson under the assignment of the lease to Hamilton; and that *Patterson* was the owner, when he was adjudged bankrupt, of the

5 per cent. reserved to Patterson under the assignment by him of the leases, etc., to Hamilton.

To illustrate the case made upon the first and second trials, we state in brief form, from the record on the former and the present appeals, the following:

1. The *answer* of Mariam A. Patterson (Tr. 15), expressly declares

“that after Wickersham returned to Fairbanks, said H. J. Patterson requested him to make a deed conveying said *quarter* interest to this defendant (Mariam) upon the ground that *she* had performed the conditions of said *contract*, but the said Wickersham *preferred to*, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant, and *delivered* the same to said H. J. Patterson on or about the 10th day of November, 1911, *but with the express understanding* had between the said Wickersham and the said H. J. Patterson at the time of such delivery, *that the latter would convey the bare legal title to said quarter interest so received by him to this defendant*” (Tr. 15).

The answer of Patterson is the same (Tr. 20-23).

2. *H. J. Patterson*, her husband, testified:

“I asked Wickersham for a half interest *and* a lay on the claim; he refused, but offered me a quarter interest *and* a 75% lay on the *whole* claim; we agreed to *that* proposition. \* \* \* I told Mrs. Patterson \* \* \* that if she wanted to pay for sinking the drill hole to bedrock, that *she* could have the *quarter interest*; if we struck pay *I* would *need all* the money *I* had to *open up* the ground, and she was willing to take the chance” (Tr. 94-95).

This agreement and lease will be found at pages 49 to 55 of the transcript.

*Patterson continues:*

“I did nothing under *the lease part* of the agreement, with the result that Wickersham forfeited the lease. I then secured a *new lease*, but had to consent to a great many things before I got it. *I considered a 75% lay on the ground very much more valuable than a quarter interest in the property; I was particularly concerned about the lease on the property.* \* \* \* Wickersham told me, ‘You have forfeited your *lease*, but I will give you the quarter *interest* any time, but if you get the *new lease* you will have to undertake certain obligations; those obligations are set forth in the *lease* of October 12, 1911, and the *agreement* (Tr. 56-69) made at the time (Tr. 96).

“I asked him to make the *deed* to Mrs. Patterson, because, as I told him, she had paid for sinking the drill holes. He *didn’t* do that and stated as his reason, ‘I don’t want to mix things up. *I want to do business with you. I will give you the deed* (Tr. 69) and you can make *the deed* to whoever you like’. \* \* \* I transferred or assigned the *lease* (Tr. 71-73) to Henry C. Hamilton” (Tr. 97-98).

“On the 27th day of November, 1911, I executed a *conveyance of this quarter interest* to my wife” (Tr. 100).

“*Under the lease* I had spent a good deal of money of my own \* \* \* prior to the time I delivered the *deed* to Mrs. Patterson, \* \* \* something over \$1400; \* \* \* none of that money was Mrs. Patterson’s (Tr. 117).

“There was *no assignment of this lease or my interest* in this lease, to Mrs. Patterson, No, there has *never been any assignment* in any other way of any interest in this lease to Mrs. Patterson” (Tr. 126).



### 3. *Mariam A. Patterson* testified:

"Judge Wickersham did not consent to give him a *half* interest, but told him he would give him a *quarter* interest *and* a 75% *lay*; then as he had only a very little money himself and he wanted to use that for working purposes, for mining purposes, he told me that if I would pay for sinking the holes, do the work necessary to acquire *the quarter* interest, that he would give me *the quarter* interest; so I consented. \* \* \* We thought *the quarter* interest, if there was anything in it at all, would be cheap at that. \* \* \* After he got to town *he phoned me* that the judge *wasn't* willing to make the deed in my name. \* \* \* I regarded myself as entitled to have the deed to the *quarter* interest \* \* \* in paying for the work necessary to acquire *the quarter* interest" (Tr. 149-151).

"I presume I did say when my deposition was taken \* \* \* that *I did not* have anything to do with *the gold produced after the lease was assigned* over to Mr. Hamilton and that *my consent* was not asked at the time of the assignment of *the lay* to him" (Tr. 157).

"I *permitted* my husband to sign his name to instruments in evidence here *in* which it is stated that *he is the owner* of the property" (Tr. 161).

*Patterson* also testified on the *first trial*:

"MR. PRATT. Q. Since that time (November 27, 1911, the date of *her* deed) it has been worked upon a lay?

A. Yes.

Q. A *lease*?

A. Yes.

Q. And the royalties accruing to a *one-quarter* interest have amounted to over five thousand dollars, haven't they?

A. I believe they have.

Q. The royalty to *one-quarter* being five per cent.?

A. Yes."

(Tr. No. 2411, *former Appeal*, p. 33.)

And, on former trial, Transcript, page 36, *Patterson* testified that the *deed* to his wife was:

"A. Well, it was merely a transfer."

*Patterson*, on pages 37 and 38, Transcript, former trial, testified:

"Q. Mr. Patterson, in addition to the title to one-quarter of the Daly Bench which you had on the 27th of November, 1911, you *also* had a *lease* upon the whole claim, did you not?

A. Yes. I made an assignment of the lease to Mr. Hamilton, and also the deed on that day. I had the lease.

Q. And you reserved five per cent. royalty to yourself, did you not?

A. Five per cent. to the quarter interest.

Q. You reserved it to yourself, did you not?

A. Well, yes, for that quarter interest.

Q. Mr. Hamilton went ahead and worked the ground under that lease, did he not, paying five per cent. into Court in this case under the injunction order?

A. Yes, sir.

Q. And the money is now in this Court?

A. Yes, sir" (Tr. No. 2411, *former appeal*, pp. 37-38).

The witness, *E. R. Peoples*, testified, as quoted in the opinion of this Court, as follows:

"Q. Just tell what you did after you ascertained that that *transfer* had been made *from Judge Wickersham to Mr. Patterson*. A. I

asked Mr. Patterson if he would not give us security on his interest in this ground. \* \* \*

Q. Is that the Daly Bench that you are referring to? A. Yes, sir; and he informed me at that time that through an arrangement with Mr. Wickersham that he couldn't give any security on that ground or transfer it in any manner. That was the sum and substance of the conversation. \* \* \* I suggested to him that he had a quarter interest in that, and he should put it up as security. \* \* \* The reason he gave me for not putting it up was that he had a written agreement \* \* \* with Judge Wickersham whereby he couldn't incumber it" (220 Federal 21, 27).

Patterson testified on present trial:

"Q. You knew that Henry Hamilton was, in other words, stepping into your shoes so far as that lease was concerned?

A. Practically. I considered it so" (Tr. 117-118).

"Q. What were you to get for the lease?

A. I was to get the difference between the Smith lease and the Hamilton lease, five per cent.

Q. You were to get a *secret* five per cent.?

A. Yes, sir" (Tr. 118).

And he testified that he never before mentioned that he was to get a *secret* five per cent., although he had been previously sworn and examined in his bankruptcy proceeding (Tr. 121-127); and asserts that this *secret* five per cent. was not transferred to his wife (Tr. 125); and that *no assignment* of the lease or of his interest in the lease was ever made to his wife, and that at the present time, as far as the papers go, *he owns* five per cent.

of the gross output under the Hamilton assignment (Tr. 126).

Patterson *never mentioned* this secret five per cent. on the *first* trial.

In her *answer*, Mrs. Patterson alleges:

“8. That during the time said H. J. Patterson held the bare legal title to said quarter interest *he made a lease* thereof to H. C. Hamilton, *reserving for said quarter interest* as rent or royalty *five per cent.* of the gross output of gold mined by said Hamilton from said mining claim during the term of such lease; that this *defendant has assented to such lease* and the rents and *royalties therein reserved*, and *by virtue of her ownership of said quarter interest she is entitled to receive five per cent.* of the gross output of gold mined by said Hamilton, as rent or royalty, at each and every cleanup” (Tr. 16).

*Patterson's* answer is the same (Tr. 22).

The truth and the facts are, that this lease by Patterson to Hamilton does *not* reserve anything *for the quarter interest*; but expressly *does reserve five per cent. to Patterson* himself (Tr. 73; 71-73).

And in *her* answer she says that *she assented* to said lease to Hamilton (Tr. 16).

The *trial* Court had *dismissed* the action, and entered judgment that the plaintiff was *not entitled to any part* of the relief he prayed, *one part* of which was that the 5 per cent. belonged to Patterson and *not* to his wife, and the plaintiff contended that as trustee of his bankrupt estate he was

entitled to recover the 5 per cent. for Patterson's creditors.

Upon this state of the case and the contentions of the parties, *this Court held:*

*"That deed did not purport to convey to the defendant Mariam A. Patterson, any part of her husband's interest in the amount due or afterwards to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of the 5 per cent. of the gross mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham. It is impossible to sustain the judgment of the Court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim under the lease assigned to him"* (Stroecker v. Patterson, 220 Federal 21, 25-26).

Among the findings of facts, made by the lower Court upon the *retrial*, the Court found:

*"10. That the said H. J. Patterson did not at any time assign, transfer, or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton, wherein said H. J. Patterson reserved to himself five per cent. of the gross output of said claim, and no transfer of said five per cent. of the gross output of said claim was ever made by said H. J. Patterson to said Mariam A. Patterson"* (Tr. 40).

And among the conclusions of law the Court found:

*"(1) That the deed from H. J. Patterson to Mariam A. Patterson of an undivided one-*



quarter interest in and to said Daly Bench vested in said Mariam A. Patterson the legal title to said property *subject to the terms and conditions of that certain lease* from James Wickersham to H. J. Patterson dated 12 October, 1911, *and no royalties were reserved to the owner of said undivided one-quarter interest* in said Daly Bench under the terms and conditions of said lease (Tr. 42).

“(2) That five per cent of the gross output of the gold and gold-dust extracted from said Daly Bench, reserved by said H. J. Patterson, in his contract with H. C. Hamilton, dated 27 November, 1911, *was reserved* to said H. J. Patterson *as lessee* of said Daly Bench *and not as the owner of an interest therein*.

“(3) That the *deed* from H. J. Patterson to Mariam A. Patterson, dated 27 November, 1911, *did not transfer* to said Mariam A. Patterson any part of *the five per cent.* of the gross output of the Daly Bench, reserved by said H. J. Patterson under his contract with H. C. Hamilton, of even date therewith, and said Mariam A. Patterson acquired no right, title, or interest in or to said five per cent. of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson.

“(4) That said Mariam A. Patterson has no right, title, or interest in or to any part of the gold or gold-dust, or the proceeds thereof, now in the registry of this court in this cause, the same being the proceeds of five per cent. of the gold and gold-dust extracted from said claim and washed from the pay-gravels therein contained, in the year 1912.

“(5) That all the moneys and gold-dust now in the registry of this court in this cause are the property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered

to plaintiff herein, to be disposed of by him in the manner directed by law, in his representative capacity as trustee for said creditors.

\* \* \* \* \*

“(7) That said Mariam A. Patterson, under the deed from H. J. Patterson to herself, dated 27 November, 1911, received the legal title to said undivided one-quarter interest in and to said Daly Bench claim, subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson, and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title, or interest in or to any of the royalties, moneys, or gold-dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton, which said last-mentioned agreement was dated 27 November, 1911” (Tr. 43-44).

*Counsel for appellant*, on the *former* appeal, being the appellee on *this* appeal, in their “*Brief on Behalf of Appellant*”, pages 21, 37, 38 and 39, stated their contentions and argued upon *this identical point*, as follows:

“On November 27, 1911, H. J. Patterson executed a sublease or assignment of the lease or lay held by him on the Daly Bench to one H. C. Hamilton, transferred to Hamilton all his interest in the lay that he had from James Wickersham, reserving to himself five per cent. (5%) of the gross mineral output thereof (Tr. pp. 39-42). In the said assignment or sublease it is recited:

‘That the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above

described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham *and in his own right as owner of an undivided one-fourth part of the title to said mining claim*, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915' (Tr. p. 40).

subject to the terms of the Wickersham lease, and obligating Hamilton as follows:

'And (Hamilton) shall pay in addition thereto five per cent. of the gross amount of each and every cleanup of gold and gold-dust made by him upon said premises to the said H. J. Patterson' (Tr. p. 41).

"On the evening of the same day, Patterson made and executed a deed from himself to Mariam A. Patterson (Tr. pp. 34-36), for the recited consideration of one dollar (\$1.00) of "all his right, title and interest, being an undivided one-fourth interest of, in and to that certain bench placer mining claim, situate in Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly Bench Placer Mining Claim, etc. (Tr. p. 35). There is no assignment in said deed of the rents, issues and profits, and only the bare land is transferred, save and except that the *habendum* clause is as follows:

'To have and to hold same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever' (Tr. p. 35).

"No assignment was ever made to Mariam A. Patterson of the lay or sublease between Hamilton and H. J. Patterson, nor were the rents, issues and profits, or any of the mineral products of said Daly Bench assigned to the defendant Mariam A. Patterson.

“NO ASSIGNMENT WAS EVER MADE OF THE INTEREST OF H. J. PATTERSON IN THE LEASE TO HAMILTON, AND ALL ROYALTIES THAT ACCRUED TO PATTERSON WERE THE PROPERTY OF PATTERSON’S CREDITORS.

“The transfer to Mrs. Patterson was of the bare legal title to the ground and the deed did not contain the ordinary clause transferring the “*rents, issues and profits*,” and this provision being omitted, it can only be presumed that they were intentionally omitted.

“Mrs. Patterson took the bare legal title, subject to the burdens then existing against it, to wit, the payment of the royalties thereafter to accrue to the grantor, her husband.”

No. 2411, in this Court; Brief for Appellant, pp. 21, 37, 38 and 39.)

*Counsel for Pattersons* (then appellees) on the former appeal, now the appellants on *this* appeal, disputed this conclusion, and in his able “*Brief on Behalf of Appellee Mariam Patterson*” on *that* appeal, thus stated the facts and argued the case, *on this identical point*, upon the same pleadings, documentary and oral evidence, as follows:

“The property in controversy in this action is an undivided quarter interest in the Daly Bench placer mining claim on Eva Creek, in the Fairbanks Recording District, Alaska, *and the royalties which accrued to said interest* from mining operations carried on by H. C. Hamilton, lessee, after November 27, 1911.

“*Appellant contends* that said quarter interest and *royalties were the property of H. J. Patterson* when he was adjudged bankrupt.

“*The appellee Mariam A. Patterson claims* that H. J. Patterson, her husband, never was the real owner of that property; *that she pur-*



chased it with her own money, through her husband, and *is entitled* to the property and *the royalties*.

“When Wickersham delivered to H. J. Patterson a deed to the quarter interest, he also gave him another lease on his, Wickersham’s remaining three-fourths of the claim. This lease H. J. Patterson subsequently transferred to H. C. Hamilton, and at the same time, November 27, 1911, he gave Hamilton a lease on the quarter interest, the legal title to which then stood in his, Patterson’s name, upon a royalty of five per cent. of the gross output; thereafter H. J. Patterson conveyed the legal title to the quarter interest to his wife. *This conveyance of the reversion entitled her to the rents and royalties subsequently accruing.*

In re Owsley’s Estate, 142 N. W. 134;  
West Shore Mills Co. v. Edwards, 33 Pac.  
987;

Tiffany on Real Property, secs. 47, 360;  
24 Cyc.. 1172;

11 Am. & Eng. Enc. Law (2d ed.) 841.”

(Brief of Appellee, pp. 1, 2 and 5; No. 2411  
in this Court.)

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## I.

**THE FORMER DECISION OF THIS COURT UPON THE FIRST APPEAL (Patterson v. Stroecker, 220 Federal 21, 25-26) IS THE LAW OF THE CASE UPON THE PRESENT APPEAL, AND FINALLY DETERMINED THAT THE DEED OF PATTERSON TO HIS WIFE DID NOT, AS IT COULD NOT UNDER THE CONDITIONS OF THE LEASES AND AGREEMENTS OF WICKERSHAM AND PATTERSON, CONVEY TO MRS. PATTERSON THE 5 PER CENT. RESERVED TO PATTERSON IN THE ASSIGNMENT OF THESE LEASES AND AGREEMENTS MADE BY HIM TO HAMILTON.**

The records and decision of this Court conclusively establish that the appellant on the former



appeal by his complaint and evidence on the trial, asserted a right to recover from and as against the defendant *Mrs. Patterson* (appellant on *this* appeal), based upon *two* propositions:

*First.* That the deed itself by Patterson to his wife was in fraud of his creditors and should be set aside.

*Second.* That the *5 per cent. reserved* by Patterson *to himself*, in the lease by him to Hamilton, did *not pass* and was *not conveyed* by the deed from Patterson to his wife, and in fact could not be conveyed or passed to his wife without Wickersham's consent because prohibited by express terms and agreement in Wickersham's lease and agreement with Patterson; that therefore, the appellee here as trustee in bankruptcy was entitled to recover this *5 per cent.* as assets of Patterson.

*Both* propositions were argued by counsel for the trustee, appellant, and by counsel for *Mrs. Patterson*, appellee.

This Court *decided both* propositions, holding that the *5 per cent. reserved* in the Hamilton lease to Patterson did not and could not pass by the deed of Patterson to his wife; and that there was sufficient evidence in the record as to the fraudulent character of the deed to call for explanation and to be overcome by *Mrs. Patterson*.

When the case went back for retrial, there was no change in the pleadings, and, except that the evidence was *stronger* in favor of Patterson *himself*

owning the 5 per cent. reserved, there was no substantial difference between the record on the present and the former trial, as to the 5 per cent. reserved to Patterson; as to the deed the trial Court found and adjudged that *Mrs. Patterson* was the owner of the quarter interest prior to the adjudication in bankruptcy and that Patterson's deed to her was not in fraud of his creditors.

In *Olsen v. North Pacific Lumber Co.*, 119 Fed. 77, 79, this Court, by Judge *Gilbert*, stated the effect of a former decision reversing the case upon a second appeal.

In *Haley v. Kilpatrick*, 104 Fed. 647, 648, the Circuit Court of Appeals for the Eighth Circuit, said:

"This is the *second* appearance of this case in this Court (66 Fed. 133). For a statement of the questions involved we refer to our former opinion. The *law of the case* was settled in the opinion of the Court when the case was first here. It remains the law of the case in this Court.

"It is well settled that a second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question either of law or fact which was considered and determined on the first appeal or writ of error. *Bridge Co. v. Stewart*, 3 How. 413, 425, 11 L. Ed. 658; *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861; *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Phelan v. City & County of San Francisco*, 20 Cal. 39, 44; *Leese v. Clark*, Id. 388. In the last case cited Mr. Justice Field, then chief

Justice of the Supreme Court of California, delivering the unanimous judgment of that court, said:

‘The decision of this court on the first appeal became the law of the case, and fixed the right of the parties in this action under their respective grants.’ ‘A previous ruling of the appellate Court,’ as we held in *Phelan v. City & County of San Francisco*, ‘upon a point distinctly made, may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; *but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.*’ 20 Cal. 39. Such has been the uniform doctrine of this court for years, and, after repeated examinations and affirmations, it cannot be considered as open to further discussion. See *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; and *Davidson v. Dallas*, 15 Cal. 82. Nor is the doctrine peculiar to this court. *It is the established doctrine of the supreme court of the United States* and of the supreme courts of several of the states. *Sibbald v. U. S.*, 12 Pet. 491, 9 L. Ed. 1167; *Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Russell v. La Roque*, 13 Ala. 151. And the reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This

will not be controverted. So, on the other hand, if *upon the construction of the contract supposed*, this court *reverses* the judgment of the court below, and orders a new trial, the decision is *equally conclusive* as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone; and, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below. *Young v. Frost*, 1 Md. 394; *McClellan v. Crook*, 7 Gill 333.'

"No new questions going to the merits of the case were raised on the second trial."

In *Board of Commissioners v. Geer*, 108 Federal 478, the same Court said:

"The judgment of this Court on the first writ of error is the law of this case, from which, under well settled authority, we could not, if we would, depart. *Balch v. Haas*, 73 Fed. 974; *Haley v. Kilpatrick*, 104 Fed. 647, and cases cited. We cannot, therefore, consider any question which was *necessarily involved in and determined* at the former hearing of this case. An examination of the record on file in this Court shows that the two most prominent assignments of error *argued* at the first hearing were," etc.

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In *Town of Fletcher v. Hickman*, 208 Federal 118, 121, the Circuit Court of Appeals for the Eighth Circuit, said:

“This court, however, directly decided and clearly declared that the court below was in error in admitting any of the evidence of no publication of the ordinance for any purpose, and that its judgment should have been for the plaintiff upon all the bonds and coupons. That decision is now the law of this case. The issues and the evidence at the second trial differ in no material respect from those at the first trial. A legal proposition once considered and decided in a given cause by an appellate court may not be again questioned in that court on a subsequent writ or appeal to review a subsequent trial of the same case on the same issues and evidence. Such propositions are *res adjudicata* between the parties to that suit and their privies and constitute the law of the case. *Thompson v. Maxwell Land Grant & Railway Co.*, 168 U. S. 451, 456, 18 Sup. Ct. 121, 42 L. Ed. 539; *Guarantee Co. of North America v. Phenix Ins. Co.*, 124 Fed. 170, 174, 59 C. C. A. 376, 380; *Balch v. Haas*, 73 Fed. 974, 20 C. C. A. 151; *Thatcher v. Gottlieb*, 59 Fed. 872, 8 C. C. A. 334; *Board of Com’rs v. Geer*, 108 Fed. 478, 47 C. C. A. 450; *Denver & Rio Grande R. R. Co. v. Arrighi*, 141 Fed. 67, 72 C. C. A. 400; *Mutual Reserve Fund Life Ass’n v. Ferrenbach*, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163; *Crotty v. Chicago Great Western Ry. Co.*, 169 Fed. 593, 596, 95 C. C. A. 91.”

Also, *Guarantee Co. of America v. Phenix Ins. Co.*, 124 Fed. 170, 174.



## II.

UNDER THE LEASES AND AGREEMENTS BETWEEN PATTERSON AND WICKERSHAM, PATTERSON WAS PROHIBITED FROM ASSIGNING AND SPECIALLY AGREED NOT TO ASSIGN THE LEASE OR LAY OR ANY INTEREST THEREIN OR THEREUNDER, OR SUBLET OR SUBLEASE ANY PART OF THE PREMISES, NOR PERMIT SAME, OR ANY PART OR ANY INTEREST THEREIN TO PASS TO ANY PERSON WHATEVER, WITHOUT WICKERSHAM'S CONSENT, AND THAT SUCH PROHIBITION SHALL EXTEND TO THE UNDIVIDED ONE-FOURTH INTEREST AS FULLY AS TO HIS THREE-FOURTHS; THEREFORE PATTERSON'S DEED TO HIS WIFE NOT ONLY DID NOT BUT COULD NOT PASS ANY INTEREST THEREIN TO HIS WIFE, AND IF IT DID, AS TO SUCH INTEREST WOULD BE VOID IN THE ABSOLUTE SENSE.

On this point we again quote from the opinion of this Court on the former appeal, *Patterson v. Stroecker*, 220 Federal 21, 25, as follows:

"Shortly before the execution of that compromise agreement, to wit, October 12, 1911, Wickersham has executed to H. J. Patterson a second lease of the Daly Bench claim for a term extending to October 12, 1915, reciting, among other things, the ownership by Wickersham of the undivided three-fourths thereof and the ownership of H. J. Patterson of the remaining one-fourth, and reciting that Patterson had applied to Wickersham for a lease covering the entire claim upon certain terms and conditions, which Wickersham thereby granted; the instrument further reciting, among other things, that:

*'As part consideration of this lease the party of the second part [H. J. Patterson] agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease, and shall also at*

all times be subject to any debts, defaults, or damages resulting from the working under this lease, or for violation thereof, and the said Daly *claim shall at all times be worked and considered as a whole* between the parties hereto, and *all subject* to the terms of this lease; and it is especially agreed that the party of the first part [Wickersham] shall have a first lien upon the whole of the output of the whole of the Daly claim, *including the undivided one-fourth interest of the party of the second part*, for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease.'

"The last-mentioned instrument further imposed upon the lessee the obligation to begin work upon the leased property within 30 days from its execution, and thereafter to continuously maintain possession of the property and mine the same in a good and minerlike manner, and, among various other terms and conditions, the following:

'And the party of the second part [H. J. Patterson] does hereby *specially agree not to assign this lease or lay, or any interest therein or thereunder*, and not to sublet or sublease the said demised premises, or any part thereof, *nor to permit the same, nor any part thereof, nor any interest therein, to pass to any other person whatever, without the written consent of the party of the first part* [Wickersham] had and obtained, and *this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part.*'

"The deed from Wickersham to H. J. Patterson of the one-quarter interest in the claim was made October 14, 1911, and contained this recitation:

‘Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States statute.’

“That deed was recorded at the request of Patterson. The deed from the latter to his wife was made November 27, 1911, expressing a consideration of \$1 and quitclaiming to her ‘all his right, title, and interest, being an undivided *one-fourth interest*,’ in the Daly Bench claim.”

Under the *express agreement* of Wickersham and Patterson in this lease of October 12, 1911, *prohibiting* assignment, sub-letting or sub-leasing, or *the passing of any part or interest therein to any other person whatever*, without consent of Wickersham, and imperatively (“shall”) making this *prohibition* “extend to the undivided *one-fourth interest* belonging to” Patterson “*as fully as to the interest belonging to*” Wickersham (Tr. 62; 56-64), Patterson did not have the legal power or authority to pass or convey to his wife the 5 per cent., reserved to him in his assignment to Hamilton; and even if Patterson had, in express terms, conveyed or passed to his wife his interest under the Wickersham and Hamilton lease, such conveyance and transfer would be null and void.

This Court has fully and clearly declared the rule of law governing such *prohibitions against assignment*, etc., contained in contracts, in the recent cases of

Welles v. Portuguese American Bank, 211 Fed. 561;

Welles v. Portuguese American Bank (re-hearing), 215 Fed. 81;  
 Portuguese American Bank v. Welles, 37  
 Sup. Ct. Rep. 3.

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### III.

WICKERSHAM AND PATTERSON AGREED THAT BY WICKERSHAM'S DEED TO PATTERSON THE BARE LEGAL INTEREST ONLY IN THE ONE-QUARTER SHOULD PASS TO PATTERSON, AND THAT PATTERSON COULD AND WOULD CONVEY ONLY THE BARE LEGAL TITLE; AND ALL OF THE EVIDENCE SHOWS THAT WAS THE PURPOSE AND INTENTION OF WICKERSHAM, OF PATTERSON AND OF MRS. PATTERSON, AND EFFECT OF THE DEED BY PATTERSON TO HIS WIFE, AND THAT NO INTEREST IN OR UNDER THE LEASE OR LAY OR THE ROYALTIES FROM WORKING THE SAME, SHOULD EVER PASS TO OR VEST IN MRS. PATTERSON.

The documentary evidence and the testimony of the witnesses found in the record on the present appeal, also in the record on the former appeal, conclusively show:

*First.* That Wickersham conveyed to Patterson, by express understanding between them when the deed was delivered, that the "*bare legal title*" only, in the quarter interest, would pass and be conveyed by the deed to Patterson.

*Mrs. Patterson's answer*, paragraph "4" (Tr. 15; Former Appeal, Tr. 14-15) expressly alleges:

" \* \* \* the said Wickersham did make such deed to said H. J. Patterson, and delivered the same to said Patterson on November 10, 1911,

*but with the express understanding had between said Wickersham and said Patterson, that the latter would convey the bare legal title to said quarter interest, so received by him, to this defendant''* (Tr. 15); *Patterson's Answer*, the same (Tr. 21; Former Tr. 20-21).

*She admits*, in her answer, that on the morning of November 27, 1911, "*the bare legal title*", was conveyed to Patterson and that the same evening Patterson conveyed to her "*the bare legal title*" to said quarter interest and that prior thereto, Patterson had lay or lease from Wickersham, and that Patterson assigned said lease to Hamilton (Tr. 11-12; Former Tr. 11-12).

The lease made by Wickersham would expire on October 12, 1915 (Tr. 58), and the assignment made by Patterson to Hamilton was for the same time (Tr. 72).

*She expressly alleges*, that Patterson received from Wickersham "*the bare legal title* to said quarter interest for the sole purpose of conveying same to her, and on November 27, 1911, he did execute a deed to her "for the sole purpose of transferring to her *the bare legal title* then standing in his name", and, that *she* "then and there received the bare legal title to said interest" (Tr. 12; Former Tr. 11).

In all her testimony, she declares that Patterson agreed to

"give me the quarter interest" (Tr. 150), "if I would do the work necessary to acquire the quarter interest" (Tr. 150). "We thought the



*quarter* interest would be cheap at that" (Tr. 150). "I regarded myself as entitled to the deed to *the quarter* interest \* \* \* because I had fulfilled my part of our contract to acquire *the quarter* interest" \* \* \* "Judge Wick-ersham never objected to my being the owner of *the quarter* interest after he knew that the deed to *the quarter* interest had been made to me. \* \* \* He never stated to me that Mr. Patterson was forbidden from conveying that *quarter* interest to me" (Tr. 151). "I considered that I was the owner of the *quarter* interest" (Tr. 153).

On *her* deposition and the second trial she testified:

"A. Harry had the lay and I owned the ground.

Q. Didn't you, during the time I have mentioned, and prior to the 27th of November, 1911, continually, in talking with some of your friends, speak of that ground as the ground that Harry owned on Ester Creek?

A. No. I always said 'we', 'our ground on Ester'.

Q. You didn't speak of it as your ground?

A. Because he had the lay and I had the interest, so I said 'we' " (Tr. 155).

"Q. And that you consented to it.

A. Yes. I presume *I did say* when my deposition was taken at the time you referred to that *I did not have anything to do with the gold produced after the lease was assigned over to Mr. Hamilton and that my consent was not asked at the time of the assignment of the lay to him*" (Tr. 157).

Nowhere in the whole record did she ever speak of anything being conveyed to her, except the *bare legal title* to this undivided *quarter* interest; and she

knew that the *bare legal title* to the *quarter* interest and the *lease* or *lay* were absolutely *separate* rights, the *one* the bare legal title to the *quarter* interest, belonging to her, the *other* the *lease* or *lay*, although the *quarter* interest was subject to it from the date of the *lease* to the date of the expiration of the *lease*, yet, the *lease* or *lay* itself belonged to Patterson, her husband, and that she never had, never received, and never had any agreement to have or receive, and under the *lease* and agreement of Wickersham and Patterson, that *she* could not have or receive without the consent of Wickersham, any interest or right whatever in or to the *lease* or *lay* or the proceeds thereof. That is why she so testified, always, as to *her quarter interest in the claim*, and that *she*

“did not have anything to do with the gold produced after the *lease* was assigned over to Hamilton and that her consent was not asked at the time of the assignment of the *lay* to him” (Tr. 155; Tr. 157).

Patterson's testimony also deals only with the *quarter* interest—that Wickersham and he agreed on a *quarter* interest and a 75% *lay*, and he told his wife *she* could have the *quarter* interest, if she would pay for sinking the hole to bedrock, as he would need all the money he had to open up the ground (Tr. 94). Patterson declared: “I considered a 75% *lay* on the ground very much more valuable than a *quarter* interest in the property. I was particularly concerned about the *lease* on the property” (Tr. 96). Mrs. Patterson corroborates

this intention and purpose, of Patterson to get the lease or lay *for himself*, and of Mrs. Patterson to get the *bare* legal title to the *quarter* interest, which quarter interest at the *end* of the lease in October, 1915 (Tr. 58) *she* would own in absolute right; and *she* declares:

“I came to pay for sinking those drill holes in this way: Mr. Patterson said he believed he would go to town and see if he could get a *half interest* in the Daly bench from Judge Wickersham *for sinking some holes or doing some assessment* work on the Daly bench; Judge Wickersham did *not consent to give him a half interest* but told him he *would give a quarter interest and a 75% lay*; then, as *he* had only a very little money himself and he wanted to use that for *mining* purposes, he told me that *if I* would pay for sinking the holes and do the work necessary *to acquire* the quarter interest, he would give me *the quarter interest*; so I consented” (Tr. 149-150).

*Confirming* all this, and demonstrating the absolute separation of the lease or lay *and* the bare legal title to the quarter interest, is the *deed* by Wickersham to Patterson of the *quarter* interest, reciting:

“Said conveyance *is made in consideration* of the doing of the *assessment work* thereon by the vendee in the year 1910, in compliance with the United States statute” (Tr. 70).

*Second.* The very *terms* of the *lease* itself show its separation from the *bare* legal title of the quarter interest, while *subjecting* the quarter interest absolutely to the lease and the rights and liabilities of Patterson, the lessee thereunder.

This lease or lay will be found in the transcript, pages 56 to 65; and, among other conditions, declares:

“The party of the first part (Wickersham) does hereby grant, devise and lease unto the said party of the second part (Patterson), the party of the second part does hereby accept the lease of *the whole* of the said premises together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold-bearing placers therein contained subject to the terms of this agreement:

“To have and to hold the same unto the said party of the second part from the date of this agreement until the 12th day of October, 1915, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rents and royalties agreed upon, or for other violation of the terms, covenants and conditions in this lease, or the agreement of even date herewith, against the said party of the second part reserved.

“*As part consideration* of this lease the party of the second part agrees that *his undivided one-fourth interest* in said premises *shall be covered and included* in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof and the *said Daly claim shall at all times be worked and considered as a whole* between the parties hereto, and *all subject to* the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, *including the undivided one-fourth interest* of the party of the second part for the payment of the royalty reserved to the



party of the first part and the performance of the terms of this lease'' (Tr. 57-58).

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#### IV.

**AUTHORITIES CITED BY APPELLANT ARE NOT IN POINT. IT WAS THE INTENTION, PURPOSE AND SUCH WERE THE TERMS OF THE WICKERSHAM LEASES AND AGREEMENT WITH PATTERSON, AND OF THE ASSIGNMENT BY PATTERSON OF THESE LEASES AND AGREEMENT TO HAMILTON, AND OF WICKERSHAM BY HIS DEED TO PATTERSON, AND PATTERSON AND MRS. PATTERSON BY HIS DEED TO HER, THAT ONLY THE BARE LEGAL TITLE TO THE QUARTER INTEREST SHOULD PASS TO PATTERSON AND FROM HIM TO HIS WIFE.**

None of the authorities cited by appellant in any manner decide or affect the questions in dispute here. They deal with the ordinary cases of transfers to lessees, merging the fee in the lessee or by the lessors to third persons, creating necessarily the legal duty of attainment by tenants to grantees of their lessors or rights of grantees to receive rents, etc., under transfers of lessors. None of these cases exhibit any intention or statement that the grantor who is both lessee and tenant in common as owner of an interest, under a lease covering the lessees' interest and the lessors', containing provisions *prohibiting* drastically any transfer or assignment of any part of the lease or of the leased premises, and subjecting the interest in the premises of the tenant in common lessee, to each and every provision of the lease, and providing for the *use*, and



operation of the premises *as a whole*, and who conveys only his interest in common, but in no manner conveying or referring to his interest as lessee, passes to such grantee his interest as lessee under such a lease; and obviously that result could not follow such a conveyance, because, among other reasons, such grantee of the interest must fill the shoes of the tenant in common lessee, which such grantee could not fill, unless by *consent* of all parties.

It is respectfully submitted, the parts of the decree appealed from should be affirmed.

Dated, San Francisco,

June 22, 1917.

McGOWAN & CLARK,  
 THOMAS A. McGOWAN,  
 JOHN A. CLARK,  
 H. E. PRATT,  
*Attorneys for Appellee.*

CHARLES J. HEGGERTY,  
 KNIGHT & HEGGERTY,  
*Of Counsel.*



No. 2923

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and  
H. J. PATTERSON,  
*Appellants,*

VS.

EDWARD STROECKER, as Trustee of  
the Estate of H. J. Patterson,  
a Bankrupt,  
*Appellee.*

## REPLY BRIEF FOR APPELLANTS.

A. R. HELIG,  
THOMAS R. WHITE,  
*Attorneys for Appellants*

**Filed**

AUG - 1 1917

Filed this.....day of July, 1917. **F. D. Monckton**

Clerk

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



No. 2923

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a Bankrupt,

*Appellee.*

## REPLY BRIEF FOR APPELLANTS.

(All italics ours.)

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We take issue with counsel for appellee on the first proposition advanced in their brief.

The question here is not as to what the deed from Patterson to his wife conveyed to her. She did not acquire her rights in the land by virtue of this deed. The deed was dated November 27, 1911. She had been the sole equitable owner of the land since September 19, 1910 (Finding 13, Tr. 41) and long before Patterson had had any dealings with Ham-



ilton. As between herself and Patterson and Patterson's creditors she needed no deed.

There are two questions for decision here: (1) What right did the ownership of a quarter interest in the mine give Mrs. Patterson in the royalty on the output of the mine? (2) What did Hamilton agree to pay the additional 5 per cent royalty for?

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## I.

The former decision of this court does not control this appeal. The case was sent back to the trial court for a trial *de novo* and is now here upon a new and different record.

The issue on the first trial was simply as to the bona fides of the deed from Patterson to his wife. The trial court had decided that the deed had been given in good faith and carried with it the 5 per cent royalty, and that by virtue of this deed alone Mrs. Patterson acquired her rights to the 5 per cent. On the second trial the claim of Mrs. Patterson to this royalty is not based alone upon the rights conveyed by this deed but upon the rights held by her as the owner of the quarter interest in the land from a time long prior to the making of any of the leases; and upon the understanding and agreement of Hamilton and Patterson as testified to by Patterson (Tr. 120 et seq. and Tr. 141) and Mrs. Patterson (Tr. 152, 159).

When the case was here before this court decided: (1) That it was error for the lower court to dismiss the suit at the close of plaintiff's evidence without requiring the defendants to make a showing as to the good faith of the conveyance from Patterson to his wife. (2) That the deed from Patterson to his wife of one-quarter of the mine did not entitle her to *all* of the royalties reserved to Patterson by the terms of the sublease.

In its decision on the former appeal (220 Fed. 25) this court said:

*“That deed did not purport to convey to the defendant, Mariam A. Patterson any part of her husband's interest in the amount then due or afterwards to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of the 5 per cent of the gross mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham.”*

This court then looked at the case as though Patterson had owned the quarter interest in the claim until he made the deed to his wife and that her rights were to be measured by the terms of the deed and as being initiated at the date of the deed. The first section of the syllabus of that opinion (220 Fed. 21) reads:

*“Where the owner of an undivided interest in a mining claim, who had leased the entire claim from his co-owner under a lease providing that he should possess and work the entire claim, including his interest, under the terms of the lease, sublet the claim to another, reserving a*

percentage of the gross output, and *thereafter* conveyed his undivided interest to his wife, the wife did not thereby become entitled to *all* of the royalties reserved in the sublease, as against the trustee in bankruptcy of her husband's estate",

whereas from the record on this appeal it appears that Mrs. Patterson owned the quarter interest during all of the period covered by any of the transactions involved here, and long prior to the date of the deed. She became the owner of the quarter interest September 19, 1910, according to the finding of the lower court (Tr. 41). The lease from Wickersham to Patterson is dated October 12, 1911 (Tr. 39). The sublease from Patterson to Hamilton November 27, 1911 (Tr. 39) and the deed from Patterson to his wife November 27, 1911 (Tr. 100), more than a year after she had become the real owner of the property.

We understand from the decision of this court on the former appeal that it was the opinion of the court at that time, that if the deed was made in good faith, and if the deed initiated the rights of Mrs. Patterson in the premises, Mrs. Patterson would be entitled to at least a one-fourth interest in the 5 per cent royalty to be paid by Hamilton. This understanding arises from the language used on pages 25 and 26 of the reported decision hereinbefore quoted. In other words, her rights based solely upon the deed would entitle her to a quarter interest in the royalty impounded. If the former decision of the court is now the law of this case, we assume that

the lower court erred on the last trial in awarding *all* of the royalty money impounded to appellee, for, in any event, at least one-fourth of it belongs to Mrs. Patterson.

But the testimony adduced at the last trial was not the same as at the former. As is pointed out on page 13 of appellee's brief, there was introduced additional documentary evidence, and the testimony of Mrs. Patterson corroborating her husband not only as to the *bona fides* of the deed but as to the consideration for the lease on Mrs. Patterson's quarter interest. Their testimony was that all of the 5 per cent to be paid by Hamilton under the sublease agreement was to be paid on account of the quarter interest of Mrs. Patterson. There was no other testimony on the subject. Nor does it seem to us that there is any inconsistency between this testimony and the written agreements. The lease from Wickersham to Patterson (Tr. 56) provided that Wickersham was to receive 25 per cent of the gross output as royalty for working his *three-quarters* interest. This royalty was afterwards reduced to 20 per cent of the gross (Tr. 146). True, this lease provided that it covered the whole claim, but this was only to protect Wickersham in the collection of his royalty and against liens on the property. Wickersham could not give Patterson a lease on the quarter interest, nor could Patterson himself. The broad language of the lease was merely to protect Wickersham. It was a bond exacted by Wickersham to secure faithful performance of the requirements of

the lessee to him. When Patterson sold out to Hamilton what would be more natural than for Patterson to require Hamilton to meet the obligations of the lease from Wickersham and to pay Patterson additional royalty on account of the quarter interest, thus conveying to Hamilton the Wickersham lease for nothing except the assumption of its obligations, but requiring a royalty of 5 per cent on account of the lease on the quarter interest. Such were the details of the arrangement according to the testimony of Patterson and his wife. There was no evidence to the contrary. Under such an arrangement the royalty to be paid by Hamilton on the quarter interest would be at a less rate than on the three-quarters. He would be paying 20 per cent for the three-quarters and only 5 per cent for the one-quarter.

The sublease agreement between Patterson and Hamilton throws no light on the question as to what the 5 per cent royalty was paid for. Whether it was the consideration for the lease on the whole claim or only on the one-quarter interest does not appear from that agreement (Tr. 72).

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## II.

As to appellee's second point it seems to us to be a sufficient answer to it to say that Wickersham is not here objecting to the deed to Mrs. Patterson or the assignment to Hamilton, but according to the



testimony expressly consented to both the deed (Tr. 98) and the assignment (Tr. 146).

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### III.

On the third point made that the “bare legal title” of the quarter interest was conveyed to Mrs. Patterson we think we have sufficiently burdened the court in our argument to the effect that Mrs. Patterson at all times herein involved was the real owner of the quarter interest and the deed given as between her and Patterson did convey but the “bare legal title”. In this matter we rely upon the finding of the lower court (Tr. 41) to the effect that Mariam A. Patterson was from the 19th day of September, 1910, the equitable owner of the quarter interest; and the testimony in the record in support thereof. This finding it seems to us forecloses all consideration here as to the ownership of this quarter interest, and as to the time when Mrs. Patterson acquired the ownership.

Dated, San Francisco,  
July 30, 1917.

Respectfully submitted,

A. R. HEILIG,  
THOMAS R. WHITE,  
*Attorneys for Appellants.*



No. 2923

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and  
H. J. PATTERSON,  
vs.

*Appellants,*

EDWARD STROECKER, as trustee of  
the estate of H. J. Patterson,  
a bankrupt,

*Appellee.*

## APPELLEE'S PETITION FOR A REHEARING.

McGOWAN & CLARK,  
THOMAS A. McGOWAN,  
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*Attorneys for Appellee  
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CHARLES J. HEGGERTY,  
KNIGHT & HEGGERTY,  
*Of Counsel.*

FILED

NOV 7 - 1917

F. C. MONCKTON

*Filed this.....day of November, 1917.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



No. 2923

IN THE

# United States Circuit Court of Appeals

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MARIAM A. PATTERSON and  
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## APPELLEE'S PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

The appellee respectfully petitions the Court  
for a rehearing of this cause for the following  
reasons:



## I.

APPELLEE HAS NOT HAD AN OPPORTUNITY TO PRESENT THIS APPEAL UPON THE GROUND THAT MRS. PATTERSON WAS EQUITABLE OWNER, AS NOW HELD BY THIS COURT. THE CASE WAS TRIED UPON THE SOLE THEORY THAT HER RIGHTS CAME FROM HER DEED, AND THE EVIDENCE THAT SHE ADVANCED THE ASSESSMENT WORK MONEY ON AGREEMENT WITH HER HUSBAND THAT SHE SHOULD OWN THE BARE LEGAL TITLE TO THE QUARTER INTEREST, WAS ONLY INTRODUCED TO SHOW THAT PATTERSON'S DEED TO HIS WIFE WAS NOT A FRAUD ON HIS CREDITORS, BECAUSE OF THEIR FORMER ORAL AGREEMENT AND THAT SHE ADVANCED THE ASSESSMENT WORK MONEY.

The opinion of this Court reversing the judgment given appellee is based upon the ground that Mrs. Patterson was the *equitable* owner of the quarter interest because she advanced the money to do the assessment work under agreement with her husband that when the legal title was conveyed by Wickersham Mrs. Patterson should own the bare legal title; and we submit that this conclusion is erroneous.

In the *present* opinion of the Court, referring to the *former* opinion, it is said "We said 'the burden was cast upon the defendants to show the good faith and honesty of *the conveyance* in question', and we remanded the case for a new trial. Now, upon the second trial the defendants have shown the good faith and honesty of the conveyance \* \* \*". That was the only theory and purpose of the evidence that Patterson and his

wife agreed that if she would do and pay for the assessment work, she should own the *bare legal* title to the quarter interest; and having shown that, appellants contended both there and here that Patterson's *deed* to her gave her the right to his share of the royalties coming to Patterson and carried *his* leasehold interest with it.

Nowhere was it ever pretended that the *deed* by Patterson to Mrs. Patterson carried with it Patterson's lease with Wickersham; nor was it ever contended anywhere in the case, that *Mrs.* Patterson became or ever was the *equitable* owner of Patterson's lease with Wickersham or of any royalties coming to Patterson under that lease.

Appellee was *nonsuited* on the first trial, and that judgment was reversed. There was not sufficient evidence before the Court on the first trial to show that she was the equitable owner of the bare legal title to the quarter interest to overcome the inference of fraud in making the deed.

The appellant's claim on the retrial and in this Court on this appeal was under the *deed* from her husband, and the *evidence* of her oral agreement with Patterson to advance the assessment work money and he to convey her the *bare legal* title, which he did, was introduced to overthrow any inference of *fraud* in the deed by Patterson to her; and the case was not tried below nor presented here upon the *theory* that she was always the *equitable* owner and that Patterson merely held the bare legal title to the quarter interest for

her until he actually conveyed by the deed in controversy.

The complaint and her *answer* and the answer of Patterson on the first appeal, and the complaint and her *answer* and Patterson's answer on this appeal are *identically the same*; and each and all they assert, that *only the bare legal title* should and did pass by Wickersham's deed to Patterson and by Patterson's deed to his wife

Wickersham and Patterson agreed that by Wickersham's deed to Patterson the bare legal interest only in the one-quarter should pass to Patterson, and that Patterson could and would convey only the bare legal title; and all of the evidence shows that was the purpose and intention of Wickersham, of Patterson and of Mrs. Patterson, and effect of the deed by Patterson to his wife, and that no interest in or under the lease or lay or the royalties from working the same, should ever pass to or vest in Mrs. Patterson.

The documentary evidence and the testimony of the witnesses found in the record on the present appeal, also in the record on the former appeal, conclusively show:

*First.* That Wickersham conveyed to Patterson, by express understanding between them when the deed was delivered, that the "*bare legal title*" only, in the quarter interest, would pass and be conveyed by the deed to Patterson.

Mrs. Patterson's *answer*, paragraph "4" (Tr. fol. 15; Former Appeal, Tr. fols. 14-15) expressly alleges:

"\* \* \* the said Wickersham did make such deed to said H. J. Patterson, and delivered the same to said Patterson on November 10, 1911, *but with the express understanding* had between said Wickersham and said Patterson, that the latter would convey *the bare legal title* to said quarter interest, *so received* by him, *to this defendant*" (Tr. fol. 15); *Patterson's Answer*, the same (Tr. fol. 21; Former Tr. fols. 20-21).

*She admits*, in her answer, that on the morning of November 27, 1911, "*the bare legal title*", was conveyed to Patterson and that the same evening Patterson conveyed *to her* "*the bare legal title*" to said quarter interest and that *prior* thereto, Patterson had lay or lease from Wickersham, and that Patterson *assigned* said lease to Hamilton (Tr. fols. 11-12; Former Tr. fols. 11-12).

The *lease* made by Wickersham would *expire* on October 12, 1915 (Tr. fols. 58), and the *assignment* made by Patterson to Hamilton was for the *same time* (Tr. fol. 72).

*She* expressly alleges, that Patterson received from Wickersham "*the bare legal title* to said quarter interest for the sole purpose of conveying same to her, and on November 27, 1911, he did execute a deed to her "*for the sole purpose* of transferring to her *the bare legal title* then standing in his name", and, that *she* "*then and there received*



*the bare legal title* to said interest” (Tr. fol. 12; Former Tr. fol. 11).

In all *her* testimony, she declares that Patterson agreed to

“give me the *quarter* interest” (Tr. fol. 150), “if I would do the work necessary to *acquire the quarter* interest” (Tr. fol. 150). “We thought *the quarter* interest would be cheap at that” (Tr. fol. 150). “I regarded myself as entitled to the deed to *the quarter* interest \* \* \* because I had fulfilled by part of our contract to acquire *the quarter* interest” \* \* \* “Judge Wickersham never objected to my being the owner of *the quarter* interest after he knew that the deed to *the quarter* interest had been made to me. \* \* \* He never stated to me that Mr. Patterson was forbidden from conveying that *quarter* interest to me” (Tr. fol. 151). “I considered that I was the owner of the *quarter* interest” (Tr. fol. 153).

On *her* deposition and the second trial she testified:

“A. Harry had the lay and I owned the ground.

Q. Didn’t you, during the time I have mentioned, and prior to the 27th of November, 1911, continually, in talking with some of your friends, speak of that ground as the ground that Harry owned on Ester Creek?

A. No. I always said ‘we’, ‘our ground on Ester’.

Q. You didn’t speak of it as your ground?

A. Because *he had the lay* and *I had the interest*, so I said ‘we’” (Tr. fol. 155).

“Q. And that you consented to it.

A. Yes. I presume *I did say* when my deposition was taken at the time you referred to that *I did not have anything to do with the*



*gold produced after the lease was assigned over to Mr. Hamilton and that my consent was not asked at the time of the assignment of the lay to him''* (Tr. fol. 157).

Nowhere in the whole record did she ever speak of anything being conveyed to her, except the *bare legal title* to this undivided *quarter* interest; and she knew that the *bare legal title* to the *quarter* interest and the *lease* or lay were absolutely *separate* rights, the *one* the bare legal title to the *quarter* interest, belonging to her, the *other* the *lease* or lay, although the *quarter* interest was subject to it from the date of the lease to the date of the expiration of the lease, yet, the lease or lay itself belonged to Patterson, her husband, and that she never had, never received, and never had any agreement to have or receive, and under the lease and agreement of Wickersham and Patterson, that *she* could not have or receive without the consent of Wickersham, any interest or right whatever in or to the lease or lay or the proceeds thereof. That is why she so testified, always, as to *her quarter* interest *in the claim*, and that *she*

“did *not* have anything to do *with the gold produced after the lease* was assigned over to Hamilton and that her consent was *not asked* at the time of the assignment of the lay to him” (Tr. fol. 155; Tr. fol. 157).

Patterson's testimony also deals only with the *quarter* interest—that Wickersham and he agreed on a *quarter* interest and a 75% lay, and he told his wife *she* could have the *quarter* interest, if she

would pay for sinking the hole to bedrock, as *he* would need all the money *he* had *to open up* the ground (Tr. fol. 94). *Patterson* declared: "*I* considered a 75% *lay* on the ground very much *more* valuable *than a quarter* interest in the property. *I* was particularly concerned about *the lease* on the property" (Tr. fol. 96). *Mrs. Patterson* corroborates this intention and purpose, of *Patterson* to get the lease or *lay for himself*, and of *Mrs. Patterson* to get the *bare* legal title to the *quarter* interest, which *quarter* interest at the *end* of the lease in October, 1915 (Tr. fol. 58), *she* would own in absolute right; and *she* declares:

"*I* came to pay for sinking those drill holes in this way: *Mr. Patterson* said he believed he would go to town and see if he could get a *half interest* in the *Daly bench* from *Judge Wickersham* *for sinking some holes or doing some assessment* work on the *Daly bench*; *Judge Wickersham* did *not consent to give him a half interest* but told him he *would* give a *quarter interest and a 75% lay*; then, as *he* had only a very little money himself and he wanted to use that for *mining* purposes, he told me that *if I* would pay for sinking the holes and do the work necessary *to acquire* the *quarter interest*, he would give me *the quarter interest*; so *I* consented" (Tr. fols. 149-150).

*Confirming* all this, and demonstrating the absolute separation of the lease or *lay* and the bare legal title to the *quarter interest*, is the *deed* by *Wickersham* to *Patterson* of the *quarter interest*, reciting:

"Said conveyance *is made in consideration* of the doing of the *assessment work* thereon by

the vendee in the year 1910, in compliance with the United States statute" (Tr. fol. 70).

*Second.* The very *terms* of the *lease* itself show *its separation* from the *bare* legal title of the quarter interest, while *subjecting* the quarter interest absolutely to the lease and the rights and liabilities of Patterson, the lessee thereunder, and the *ownership of the lease* in Patterson as absolutely *separated* from the bare legal title which was in Mrs. Patterson.

This lease or lay will be found in the transcript, pages 56 to 65; and, among other conditions, declares:

"The party of the first part (Wickersham) does hereby grant, devise and lease unto the said party of the second part (Patterson), the party of the second part does hereby accept the lease of *the whole* of the said premises together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold-bearing placers therein contained subject to the terms of this agreement:

"To have and to hold the same unto the said party of the second part from the date of this agreement until the 12th day of October, 1915, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rents and royalties agreed upon, or for other violation of the terms, covenants and conditions in this lease, or the agreement of even date herewith, against the said party of the second part reserved.

"*As part consideration* of this lease the party of the second part agrees that *his undivided*

*one-fourth interest in said premises shall be covered and included in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease"* (Tr. fols. 57-58).

Wickersham had the legal right to make the lease to Patterson and convey the bare legal title to the quarter interest (which was *subjected to the terms of the lease*) *also* to Patterson; each *separate* estates, a leasehold and a fee subjected to the terms of the lease, and that is what Wickersham did. Patterson had the legal right to agree with his wife that if she did the assessment work *she* should own the quarter interest; each again *separate* estates, a leasehold estate *in Patterson*, and the fee in the quarter interest *in Mrs. Patterson*, and that is what Patterson and his wife agreed, and that is what Patterson conveyed to his wife, admitted and expressly alleged in the complaint and in the *separate* answers of *Mrs. Patterson* and *Patterson*; and that is what the testimony of *Mrs. Patterson* and *Patterson*, above quoted, demonstrates.



*Mrs. Patterson* owned the fee of the quarter interest, *subject* to the lease to Patterson. *Patterson* owned the lease; and *at the expiration* of the lease, *Mrs. Patterson* owned the *absolute* fee.

The opinion of this Court is not correct in stating that Patterson was *her agent*. Patterson was the *lessee* from Wickersham and *Mrs. Patterson* was the owner of the quarter interest, subjected to the lease of Wickersham to Patterson. *Mrs. Patterson* did not own and had no interest in this lease from Wickersham to Patterson, and it was expressly agreed between Wickersham and Patterson, and between *Mrs. Patterson* and her husband that *he* owned the lease, *she* owned the quarter interest subjected to his lease.

Patterson as owner of the lease had the absolute legal right to *sub-lease* to Hamilton with Wickersham's consent, which he did.

The *complaint* prayed the following relief:

1. That *Mrs. Patterson* had no interest in this gold dust, because it was royalty under Wickersham's lease to Patterson and Patterson's sub-lease to Hamilton.

2. That the *deed* from Patterson to his wife be declared fraudulent and that she reconvey the quarter interest (Tr. fols. 9-10).

The present judgment gives *Mrs. Patterson* her *quarter interest* which Patterson's *deed* conveyed to her; and gives the *royalty* under the sub-lease to Hamilton of the Wickersham lease to Patterson.



*Mrs. Patterson* never claimed to own the *leasehold* interest of *Patterson* under the lease to him by *Wickersham*; that lease was *his*, and his sub-lease of that lease to *Hamilton* was *his*; it never was, it never became, it was never agreed to be *Mrs. Patterson's*, and it was never assigned to her and did not pass to her by *Patterson's deed*.

The Court is in error in holding that *Patterson* was the trustee for his wife of the *leasehold* interest; he *was* trustee for his wife of the *bare legal title* subjected to his own leasehold. *Patterson* never gave a lease to *Hamilton* or received a lease from *Wickersham* of *the quarter* interest of *Mrs. Patterson*. *Patterson* sublet his own lease to *Hamilton*.

We respectfully submit, that this Court in its opinion has reversed appellee's judgment upon a *ground and theory different* from that upon which the case was tried *under the pleadings and the evidence*, and presented in this Court upon both the former and the present appeal.

And we respectfully ask that the Court give us an opportunity which we have not had, on a rehearing, of presenting this case on the ground and theory stated in the opinion of the Court.

## II.

THE JUDGMENT HERE ONLY CONCERNS THE GOLD DUST, THE ROYALTY PAYABLE TO PATTERSON BY HAMILTON UNDER THE SUB-LEASE BY PATTERSON OF HIS LEASE WITH WICKERSHAM. MRS. PATTERSON NEVER CLAIMED TO OWN THE LEASEHOLD INTEREST WHICH WICKERSHAM GAVE TO PATTERSON UNDER HIS LEASE; PATTERSON NEVER AGREED TO CONVEY AND NEVER CONVEYED HIS LEASEHOLD INTEREST TO MRS. PATTERSON, AND SHE DOES NOT CLAIM THAT HE DID. THEREFORE, THERE CAN BE NO QUESTION BUT THAT THE FORMER DECISION IS THE LAW OF THE CASE.

There is no claim or pretense of claim anywhere or at any time in the lower Court or in this Court, that Patterson agreed that *Mrs.* Patterson should own *his lease* with Wickersham, if she would do the work and pay the assessment work money; and she claimed the royalty under the sub-lease to Hamilton because of and under Patterson's deed to her, which this Court clearly held on the former appeal the deed did not convey to her.

The leasehold interest of Patterson under *his* lease with Wickersham always was his own. He never agreed and Mrs. Patterson never asserted that Patterson agreed that *she* should own *his* lease with Wickersham. And of course, if Patterson owned the Wickersham lease, as he admittedly did, he owned also the *sub-lease* he made to Hamilton of the Wickersham lease.

*Mrs.* Patterson owned the quarter interest in the mine, but *subjected* to the lease of Patterson with Wickersham; and Patterson himself owned

the lease he made with Wickersham, and the sub-lease of that lease which he made with Hamilton, and the royalties therefrom.

The Wickersham lease to Patterson and his sub-lease thereof to Hamilton are absolutely *separate* from the bare legal title to the quarter interest which Patterson agreed he would give her if she did the assessment work and which he subsequently deeded to her.

Wickersham made a *lease* to Patterson which subjected the *whole claim* to its terms.

Wickersham also, after making the lease, made a separate *deed* to Patterson for a quarter interest in the claim.

The *answer* of Mariam A. Patterson (Tr. fol. 15), expressly declares

“that after Wickersham returned to Fairbanks, said H. J. Patterson requested him to make a deed conveying said *quarter* interest to this defendant (Mariam) upon the ground that *she* had performed the conditions of said *contract*, but the said Wickersham *preferred to*, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant, and *delivered* the same to said H. J. Patterson on or about the 10th day of November, 1911, *but with the express understanding* had between the said Wickersham and the said H. J. Patterson at the time of such delivery, *that the latter would convey the bare legal title to said quarter interest so received by him to this defendant*” (Tr. fol. 15).

The answer of Patterson is the same (Tr. fols. 20-23).

*H. J. Patterson*, her husband, testified:

"I asked Wickersham for a half interest *and* a lay on the claim; he refused, but offered me a quarter interest *and* a 75% lay on the whole claim; we agreed to *that* proposition. \* \* \* I told Mrs. Patterson \* \* \* that if she wanted to pay for sinking the drill hole to bedrock, that *she* could have *the quarter interest*; if we struck pay *I* would *need all* the money *I* had to *open up* the ground, and she was willing to take the chance" (Tr. fols. 94-95).

*Mariam A. Patterson* testified:

"Judge Wickersham did not consent to give him a *half* interest, but told him he would give him a *quarter* interest *and* a 75% *lay*; then as he had only a very little money himself and he wanted to use that for working purposes, for mining purposes, he told me that if I would pay for sinking the holes, do the work necessary to acquire *the quarter* interest, that he would give me *the quarter* interest; so I consented. \* \* \* We thought *the quarter* interest, if there was anything in it at all, would be cheap at that. \* \* \* After he got to town *he phoned me* that the judge *wasn't* willing to *make the deed in my name*. \* \* \* I regarded myself as entitled to have the deed to *the quarter* interest \* \* \* in paying for the work necessary to acquire *the quarter* interest" (Tr. fols. 149-151).

"I presume I did say when my deposition was taken \* \* \* that *I did not* have anything to do with *the gold produced after the lease was assigned* over to Mr. Hamilton and

that *my consent* was not asked at the time of the assignment of *the lay* to him" (Tr. fol. 157).

"I *permitted* my husband to *sign* his name to instruments in evidence here in which it is stated that *he is the owner* of the property" (Tr. fol. 161).

*Patterson* continues his testimony:

"I did nothing under *the lease* part of the agreement, with the result that Wickersham forfeited the lease. I then secured a *new lease*, but had to consent to a great many things before I got it. *I considered a 75% lay* on the ground very much *more valuable than a quarter interest* in the property; *I* was particularly *concerned* about the *lease* on the property. \* \* \* Wickersham told me, 'You have forfeited your *lease*, but I will give *you* the quarter *interest* any time, but if you get the *new lease* you will *have to undertake* certain obligations; those obligations are set forth in the *lease* of October 12, 1911, and the *agreement* (Tr. fols. 56-69) made at the time (Tr. fols. 96).

"I asked him to make the *deed* to Mrs. Patterson, because, as I told him, she had paid for sinking the drill holes. He *didn't* do that and stated as his reason, 'I don't want to mix things up. *I want to do* business with *you*. I will give *you the deed* (Tr. fol. 69) and you can make *the deed* to whoever you like'. \* \* \* I transferred or assigned the *lease* (Tr. fols. 71-73) to Henry C. Hamilton" (Tr. fols. 97-98).

"On the 27th day of November, 1911, I executed a *conveyance of this quarter interest* to my wife" (Tr. fol. 100).



“There was *no assignment of this lease or my interest* in this lease, to Mrs. Patterson. No, there has *never been any assignment* in any other way of any interest in this lease to Mrs. Patterson” (Tr. fol. 126).

We respectfully ask the Court to grant us a rehearing of this cause, especially do we ask the opportunity to be reheard by the Court because the *opinion* and decision of the Court have passed upon a ground and theory of the case different from that taken upon the trial, and different from that upon which the case was presented to this Court in the written briefs.

Dated, San Francisco,  
November 7, 1917.

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehear-

ing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,  
*Of Counsel for Appellee  
and Petitioner.*



